



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY



3 2044 078 483 872





HARVARD LAW LIBRARY

Received JUN 20 1918

621

















**CASES ARGUED AND DECIDED**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MISSISSIPPI**

**AT THE**  
**OCTOBER TERM, 1917.**

**VOL. 116.**

**REPORTED BY**  
**ROBERT POWELL**

**COLUMBIA, MISSOURI**  
**E. W. STEPHENS PUBLISHING COMPANY**  
**LAW PUBLISHERS**  
**1918**



---

---

Entered according to act of Congress in the year 1918 by  
**E W STEPHENS PUBLISHING COMPANY**  
In the office of the Librarian of Congress at Washington, D. C.

---

---

JUN 20 1918

## OFFICERS OF THE SUPREME COURT.

---

HON. SYDNEY SMITH, . . . . . *Chief Justice.*  
HON. SAM C. COOK, . . . . . *Associate Justice.*  
HON. J. MORGAN STEVENS, . . . . . *Associate Justice.*  
HON. JOHN BURT HOLDEN . . . . . *Associate Justice*  
HON. EUGENE OCTAVE SYKES . . . . . *Associate Justice*  
HON. GEO. H. ETHRIDGE . . . . . *Associate Justice*

---

ROSS A. COLLINS, . . . . . *Attorney-General.*  
FRANK ROBERSON . . . . . *Assistant Attorney-General*  
EARLE FLOYD . . . . . *Assistant Attorney-General.*  
ROBERT POWELL, . . . . . *Reporter.*  
GEORGE C. MYERS, . . . . . *Clerk.*  
WILLIAM JASPER BROWN, . . . . . *Deputy Clerk.*

## CIRCUIT JUDGES.

---

<i>First District,</i>	.	.	HON. CLAUDE CLAYTON.
<i>Second District,</i>	.	.	HON. JAMES H. NEVILLE.
<i>Third District,</i>	.	.	HON. J. L. BATES.
<i>Fourth District,</i>	.	.	HON. FRANK E. EVERETT.
<i>Fifth District,</i>	.	.	HON. H. H. ROGERS.
<i>Sixth District,</i>	.	.	HON. R. E. JACKSON.
<i>Seventh District,</i>	.	.	HON. W. H. POTTER.
<i>Eighth District,</i>	.	.	HON. J. D. CARR.
<i>Ninth District,</i>	.	.	HON. E. L. BRIEN.
<i>Tenth District,</i>	.	.	HON. ROLAND W. HEIDELBERG.
<i>Eleventh District,</i>	.	.	HON. W. A. ALCORN JR.
<i>Twelfth District,</i>	.	.	HON. PAUL B. JOHNSON.
<i>Thirteenth District,</i>	.	.	HON. W. H. HUGHES.
<i>Fourteenth District,</i>	.	.	HON. J. F. GUYNES.
<i>Fifteenth District,</i>	.	.	HON. A. EDWARD WEATHERSBY
<i>Sixteenth District,</i>	.	.	HON. T. B. CARROLL.
<i>Seventeenth District,</i>	.	.	HON. E. D. DINKINS.

## CHANCELLORS.

---

<i>First District,</i>	.	.	HON. A. J. MCINTYRE.
<i>Second District,</i>	.	.	HON. G. C. TANN.
<i>Third District,</i>	.	.	HON. JAMES G. MCGOWEN.
<i>Fourth District,</i>	.	.	HON. R. W. CUTRER.
<i>Fifth District,</i>	.	.	HON. OSCAR B. TAYLOR.
<i>Sixth District,</i>	.	.	HON. A. Y. WOODWARD.
<i>Seventh District,</i>	.	.	HON. J. A. MAY.
<i>Eighth District,</i>	.	.	HON. W. H. DENNY.
<i>Ninth District,</i>	.	.	HON. EMMETT N. THOMAS.
<i>Tenth District,</i>	.	.	HON. D. M. RUSSELL.

## DISTRICT ATTORNEYS.

---

<i>First District,</i>	.	.	.	.	J. E. BERRY
<i>Second District,</i>	.	.	.	.	J. C. ELMER.
<i>Third District,</i>	.	.	.	.	R. H. KNOX.
<i>Fourth District,</i>	.	.	.	.	J. M. FOREMAN.
<i>Fifth District,</i>	.	.	.	.	JOHN F. ALLEN.
<i>Sixth District,</i>	.	.	.	.	R. E. BENNETT.
<i>Seventh District,</i>	.	.	.	.	J. H. HOWIE.
<i>Eighth District,</i>	.	.	.	.	W. C. EASTLAND.
<i>Ninth District,</i>	.	.	.	.	JAMES D. THAMES.
<i>Tenth District,</i>	.	.	.	.	M. V. B. MILLER.
<i>Eleventh District,</i>	.	.	.	.	S. G. SALTER.
<i>Twelfth District,</i>	.	.	.	.	R. S. HALL.
<i>Thirteenth District,</i>	.	.	.	.	G. R. NOBLES.
<i>Fourteenth District,</i>	.	.	.	.	H. V. WALL.
<i>Fifteenth District,</i>	.	.	.	.	TOXEY HALL.
<i>Sixteenth District,</i>	.	.	.	.	GUY J. RENCHER.
<i>Seventeenth District,</i>	.	.	.	.	RICHARD DENMAN.

## CASES REPORTED.

---

### A

Adams v. First Nat. Bank of Gulfport .....	450
Alabama & V. Ry. Co., Lockman v. ....	772
Albritton v. Fairley .....	705
Aldridge v. Aldridge .....	385
Aldridge, Aldridge v. ....	385
American Bankers Safety Co., Hall v. ....	606

### B

Bank of Batesville, Robertson v. ....	501
Bank of Commerce, Perry v. ....	838
Bank of Commerce, Rayburn v. ....	54
Bank of Newton, Pate v. ....	666
Barner v. Rule .....	600
Barries, Bass v. ....	419
Bass v. Barries .....	419
Bear Creek Mill Co., Huff v. ....	509
Bernstein v. Yazoo & M. V. R. R. Co. ....	382
Bibby v. Broome.....	70
Blewett, Lee v. ....	341
Bright v. Finkbine Lumber Co. ....	491
Bright, Sawmill Const. Co. v. ....	491
Brooks & Myers v. Gulfport Grocery Co. ....	646
Broome, Bibby v. ....	70
Buckwalter Lumber Co., Hartford Fire Insurance Co. v. ....	822
Burton et al. v. Pepper et al. ....	139
Butler v. Eminent Household of Columbian Wood- men .....	85

### C

Carmichael v. Parks .....	710
Castleman, Lake v. ....	175
Castleman et al., Lynchburg Shoe Co. v. ....	188
City of Gulfport v. Shepperd .....	439

(VII)

City of Vicksburg, Williams v. ....	79
Cotton Oil Co., State ex rel. Collins v. ....	398
Cotton Oil Co., Union, v. Patterson .....	802
Currie v. Ulmer .....	187

## D

Dibert v. Durham .....	469
Duffy v. Kilroe .....	7
Durham, Dibert v. ....	469

## E

Edward Holland & Co., Townes & Sturdivant v. ....	541
Eminent Household of Columbian Woodmen, Butler v. ....	85
Eminent Household of Columbian Woodmen v. Wicker .....	211
Evans Piano Co. v. Tully .....	267

## F

Fairley, Albritton v. ....	705
Farmer, Sovereign Camp, Woodmen of the World v. ....	626
Ferguson-Palmer Co., Kirkpatrick v. ....	874
Fidelity & Guaranty Co., U. S., v. State to Use of Henson .....	1
Finkbine Lumber Co., Bright v. ....	491
First Nat. Bank of Gulfport, Adams v. ....	450
First State Bank, U. S. Fidelity Co. v. ....	239
Fisher, Miller v. ....	350
Folsom v. Illinois Central Railroad Co. ....	561
Foote-Patrick Co. v. Merkle .....	720

## G

Gambrell, Hebron Bank v. ....	343
Garber, Lumber & Mfg. Co. v. ....	229
Garbutt v. State .....	424
Gavin v. Gavin .....	197
Gavin, Gavin v. ....	197
Georgia Life Ins. Co. v. Mississippi Cent. R. Co. ....	114
Grand Lodge of Free & Accepted Masons of Missis- sippi, Vicksburg Lodge v. ....	214

Green River Lumber Co., Scott & Garrett v. ....	524
Grocery Co., Gulfport, Brooks & Myers v. ....	646
Guarantee & Accident Co., London, v. J. J. Newman Lumber Co. ....	534
Guido, McCabe v. ....	858
Gulfport Grocery Co., Brooks & Meyers v. ....	646
Gulfport & Mississippi Coast Traction Co. v. Hicks	164
Gwin v. Gwin	619
Gwin, Gwin v.	619

## H

Hall v. American Bankers Safety Co. ....	606
Hamilton, State v. ..	697
Hartford Fire Insurance Co. v. Buckwalter Lum- ber Co. ....	822
Harvison v. Turner	550
Havens, Thibodeaux v.	476
Hazlehurst Oil Mill & Fertilizer Co., W. U. Tele- graph Co. v. ....	372
Hebron Bank v. Gambrell	343
Helm v. Sheeks	726
Henderson, Town of Sumner v.	64
Hendricks v. Kellog et al.	22
Hickahala Drainage District, Wooten v.	787
Hickory, Russell v.	46
Hicks, Gulfport & Mississippi Coast Traction Co. v.	164
Hinton, Liverpool & London & Globe Ins. Co. v.	754
Horton v. Lincoln County	813
Huff v. Bear Creek Mill Co.	509

## I

Illinois Central Railroad Co., Folsom v. ....	561
Illinois Central R. Co. v. Mississippi Railroad Com- mission	484
Illinois Central R. Co. v. Rogers & Hurdle	99
Illinois Central R. Co. v. Walker	431
Insurance Co., Georgia Life, v. Mississippi Central R. Co.	114
Insurance Co., Hartford Fire, v. Buckwalter Lum- ber Co.	822



Insurance Co., Liverpool & London & Globe, v. Hinton .....	754
Insurance Co., Metropolitan Casualty, v. Lightsey	136
Insurance Co., Metropolitan Casualty, v. Shelby ..	278

## J

Johnson, Shrader v. ....	467
Jones v. Mississippi Farms Co. ....	295
J. J. Newman Lumber Co., London Guarantee & Accident Co. v. ....	534
Joullian, Louisville & N. R. Co. v. ....	40

## K

Kellog et al., Hendricks v. ....	22
Kilroe, Duffy v. ....	7
Kirkpatrick v. Ferguson-Palmer Co. ....	874

## L

Lake v. Castleman .....	175
Lamar County v. Tally & Mayson .....	588
Laurel Oil & Fertilizer Co., Maryland Casualty Co. v. ....	283
Lee v. Blewett .....	341
Lewis v. Myer .....	454
Liberty Bank v. Wilson .....	377
Lightsey, Metropolitan Casualty Ins. Co. v. ....	136
Lincoln County, Horton v. ....	813
Liverpool & London & Globe Ins. Co. v. Hinton ...	754
Lockman v. Alabama & V. Ry. Co. ....	772
London Guarantee & Accident Co. v. J. J. Newman Lumber Co. ..	534
Louisville & N. R. Co. v. Joullian.....	40
Lowden, W. U. Telegraph Co. v. ....	379
Lumber Co., Buckwalter, Hartford Fire Insurance Co. v. ....	822
Lumber & Mfg. Co. v. Garber .....	229
Lumber Co., Warren-Godwin, v. Postal Telegraph- Cable Co. ....	660
Lynchburg Shoe Co. v. Castleman et al. ....	188

## M.

Maryland Casualty Co. v. Laurel Oil & Fertilizer Co. ....	283
McCabe v. Guido .....	858
McShane Cotton Co. v. Smith .....	779
Merkle, Foote-Patrick Co. v. ....	720
Metropolitan Casualty Ins. Co. v. Lightsey .....	136
Metropolitan Casualty Ins. Co. v. Shelby .....	278
Miller v. Fisher .....	350
Mississippi Central R. Co., George Life Ins. Co. v. ....	114
Mississippi Farms Co., Jones v. ....	295
Mississippi Railroad Commission, Illinois Central R. Co. v. ....	484
Moorehead, Williams v. ....	653
Mortgage Co., Vinson v. ....	59
Myer, Lewis v. ....	454

## N.

Naylor, Wilson v. ....	573
Newton Oil Mill v. Spencer .....	568
Newman Lumber Co., J. J., Guaranty Accident Co. v. ....	534

## P.

Parks, Carmichael v. , .....	710
Pate v. Bank of Newton .....	666
Patterson, Union Cotton Oil Co. v. ....	802
Pepper et al., Burton et al. v. ....	139
Perry v. Bank of Commerce .....	838
Pigford Grocery Co. v. Wilder .....	233
Postal Telegraph-Cable Co., Warren-Godwin Lumber Co. v. ....	660
Price v. Sims .....	687

## R.

Railroad Co., Ill. Central, Folsom v. ....	561
Railroad Co., Ill. Central, v. Miss. Railroad Comm. ....	484
Railroad Co., Illinois Central, v. Rogers & Hurdle ..	99
Railroad Co., Mississippi Central, Georgia Life Ins. Co. v. ....	114

Railroad Co., Yazoo & M. V., Bernstein v. ....	382
Railway Co., A. & V., Lockman v. ....	772
Rayburn v. Bank of Commerce .....	54
Robertson v. Bank of Batesville .....	501
Robertson, Telegraph & Cable Co. v. ....	204
Rogers & Hurdle, Illinois Central R. Co. v. ....	99
Rule, Barner v. ....	600
Russell v. Hickory .....	46

## S.

Sawmill Const. Co. v. Bright .....	491
Scott & Garrett v. Green River Lumber Co. ....	524
Sheeks, Helm v. ....	726
Shelby, Metropolitan Casualty Ins. Co. v. ....	278
Shepperd, City of Gulfport v. ....	439
Shrader v. Johnson .....	467
Sims, Price v. ....	687
Smith, McShane Cotton Co. v. ....	779
Smylie et al., Watts, v. ....	12
Sovereign Camp, Wooman of the World v. Farm- ers .....	626
Spencer, Newton Oil Mill v. ....	568
State ex rel. Collins v. Cotton Oil Co. ....	398
State, Garbutt v. ....	424
State v. Hamilton .....	697
State to Use of Hinson, U. S. Fidelity Co. v. ....	1
Sturges, Woods v. ....	412

## T

Tally & Mayson, Lamar County v. ....	588
Telegraph-Cable Co., Postal, Warren-Godwin Lum- ber Co. v. ....	660
Telegraph & Cable Co. v. Robertson .....	204
Thibodeaux v. Havens .....	476
Townes & Sturdivant v. Edward Holland & Co. ....	541
Town of Sumner v. Henderson .....	64
Tully, Evans Piano Co. v. ....	267
Turner, Harvison v. ....	550

## U

Ulmer, Currie v. ....	187
Union Cotton Oil Co. v. Patterson.....	802
Union Naval Stores Co., West v. ....	743
U. S. Fidelity Co. v. First State Bank .....	239
U. S. Fidelity & Guaranty Co. v. State to Use of Henson .....	1
U. S. Fidelity & Guaranty Co. v. Yazoo City. ....	358

## V

Vicksburg Lodge v. Grand Lodge of Free & Ac- cepted Masons of Mississippi.....	214
Vinson v. Mortgage Co. ....	59

## W

Walker, Illinois Central R. Co. v. ....	431
Warren-Godwin Lumber Co. v. Postal Telegraph- Cable Co. ....	660
Watts v. Smylie et al. ....	12
Weil Bros. v. Wittjen .....	514
West v. Union Naval Stores Co. ....	743
Wicker, Eminent Household of Columbian Wood- men v. ....	211
Wilder, Pigford Grocery Co. v. ....	233
Williams v. City of Vicksburg .....	79
Williams v. Moorehead .....	653
Wilson, Liberty Bank v. ....	377
Wilson v. Naylor .....	573
Wittjen, Weil Bros. v. ....	514
Woodmen of the World, Sovereign Camp v. Farmer	626
Woods v. Sturgis .....	412
Wooten v. Hickahala Drainage District .....	787
W. U. Telegraph Co. v. Lowden .....	379
W. U. Telegraph Co. v. Hazlehurst Oil Mill & Fertilizer Co. ....	372

## Y

Yazoo City, U. S. Fidelity & Guaranty Co. v. ....	358
Yazoo & M. V. R. R. Co., Bernstein v. ....	382



CASES ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF MISSISSIPPI  
AT THE  
OCTOBER TERM, 1917

---

UNITED STATE FIDELITY & GUARANTY Co. v. STATE TO USE  
OF HINSON.

[76 South. 744, Division B.]

**JUDGMENT.** *Opening default judgment. Power of court. Code 1906, section 4687.*

In a suit by the state against a sheriff and a surety on his official bond to the use of one for whom the sheriff had negligently failed to provide the jail accommodations required by section 4687, Code 1906, where service was had on the surety, but the sheriff was not found and a judgment by default was taken against the surety at the return term, and the surety appeared before the expiration of the return term and sought to have the judgment by default set aside which the court denied and a writ of inquiry was awarded and the case continued, and at the next term the motion to set aside was renewed, which was supported by the appearance of the sheriff ready to defend on the issue of liability and the court again refused to set aside the judgment by default and so the question of liability of the sheriff was never tried by a jury. In such case the lower court's denial of the surety's motion to set aside the default judgment on the ground that it had no power to do so was error, in view of the facts that the sheriff's liability was not tried on its merits.

APPEAL from the circuit court of Simpson county.  
HON. W. H. HUGHES, Judge.  
116 Miss.] (1)

Suit by the state of Mississippi for the use of Irvin Hinson against W. M. Lee, Sheriff of Simpson county and the United States Fidelity & Guaranty Company, surety on his bond. Judgment by default against the surety, motion to set aside the judgment denied, motion of the sheriff for permission to defend denied, and verdict for plaintiff against the surety, and it appeals.

The facts are fully stated in the opinion of the court.

*Hilton & Hilton*, for appellant.

We will discuss the second assignment of error which deals with the court below refusing to entertain a plea of appellant to the jurisdiction. The court below labored under the impression that after he had granted the judgment by default, it was pig tight, horse high and bull strong so far as the power of discretion of the court was concerned to set aside the judgment by default regardless of when or what kind of showing was made. We will quote the court's language found on page 26 of the record to wit: "As to this question of default, there is no doubt but that the court will have to overrule the motion to set aside the default. It is not a question in which the court can exercise any kind of discretion." This motion was made within two or three hours after the judgment by default was rendered and at the same term of court and on the same day of the default judgment.

This court has said in *Barker v. Justice*, 41 Miss. 240, "that the court has full power over judgments by default during the term at which they are rendered and may set them aside in its discretion, except after writ of inquiry, executed and judgment entered thereon, and then they can be set aside only for good cause shown therefor under oath."

To like effect is the case of *Jones v. Commercial Bank of Columbus*, 5 How. 43, and in the case of *Myer v. Whitehead*, 62 Miss. 387, it was held proper to vacate

and annul a default judgment at the succeeding term after it was rendered. For a fuller citation of authorities, we cite the court to section 138, under subject of Judgments, Vol. 2, of Bobbs, Merrill Miss. Digest.

In the case it was shown that Mr. Hall, who represented the appellant, in Memphis, Tennessee, had been unable to attend to business for thirty days and was the only attorney until after the judgment by default was rendered, who was representing appellant. We think this was sufficient cause alone to have caused the judgment to be set aside, especially in view of the fact that Mr. Lofton, the attorney that was employed on that date offered to file pleas then and there at that term of this court and the case was continued by order of the court on the writ of inquiry.

*Mayes, Wells, May & Sanders*, for appellee.

It is first contended that the trial court erred in overruling the motion to vacate the default judgment upon the ground that the trial court stated, "As to this question of default, there is no doubt but that the court will have to overrule the motion to set aside the default. It is not a question in which the court can exercise any kind of discretion."

We respectfully submit that this contention is wholly without merit, for the reason that the facts disclosed by the record conclusively established that the court did not, under the peculiar facts and circumstances in this case, have any right to exercise discretion in favor of the appellant, because of the gross laches of the appellant in failing to give any attention whatever to the case until after default judgment had been rendered on the last day of the term of the court, at which said cause was triable.

It affirmatively appears that Hon. W. M. Lofton had been in communication with the appellant long before



the default judgment was taken and soon after the process was served, and that appellant was duly advised that the cause was pending, having been duly served with process, it was required to give attention to the case on or before the first day of the court, which it wholly, without justification or excuse failed and neglected to do. The only justification or excuse offered in the proof was that its general attorney, Hon. W. M. Hall, had been ill and had not been able to give personal attention to the case; and this honorable court will scan this record in vain to find evidence of some effort to protect this appellant against a default judgment. The case had simply been ignored by appellant; it had failed or declined to employ Mr. Lofton, or any other attorney, to give attention to the case or to request a postponement of the case or to do anything except to leave the appellee to his only recourse of taking a judgment by default on the very last day of the court. So that the authorities which counsel cite in support of their contention that the court did have discretion, have no application to the instant case, for the reason as above stated, that the facts and circumstances which would entitle the court to exercise such discretion did not exist in the instant case and hence the trial court was perfectly accurate in stating that he had no discretion to vacate the default judgment in this case.

Cook, P. J., delivered the opinion of the court.

In this case a suit was instituted by the state for the use of one Irvan Hinson against W. M. Lee, sheriff of Simpson county, and the United State Fidelity & Guaranty Company, surety on the official bond of the said sheriff. The declaration avers that the sheriff, as jailer, had plaintiff in his possession as a prisoner, and negligently failed to provide plaintiff with the accommodations, conveniences, and comforts required by section

4687 of the Code; that he was illegally and negligently placed in the same cell with a negro lunatic, and that the said lunatic assaulted him and painfully and seriously wounded him. Service was had on the surety, but the summons was returned "not found" as to the principal, the sheriff. Neither the sheriff nor the surety pleaded to the declaration at the time required by statute, and a judgment by default was taken against the appellant, as surety, and a writ of inquiry awarded to assess damages, whereupon the appellant entered an appearance, and asked the court to set aside and vacate the default judgment against it. This motion was overruled, the trial judge stating:

"As to this question of default, there is no doubt but that the court will have to overrule the motion to set aside the default. It is not a question in which the court can exercise any kind of discretion."

Thereupon the hearing of the writ of inquiry to assess damages was continued until the next term of the court. At the next term a similar motion was again filed by the surety company asking the court to set aside the judgment by default, because it was sued jointly as surety with said Lee as principal, seeking a recovery for wrongs and injuries amounting to a breach of the official bond of said Lee, and because no valid judgment could be entered against it alone without dismissing as to said Lee. Upon motion of plaintiff this motion was stricken from the files. At the same term the sheriff appeared, and entered his appearance and asked that he be permitted to defend the suit against him. This too was denied. The question of damages was then submitted to the jury on evidence of both sides, and the jury returned a verdict for the plaintiff assessing his damages at two hundred and fifty dollars. From this judgment this appeal was prosecuted.

We have not seen fit to go into the numerous motions and counter motions made and ruled on in the trial of

this case, but will content themselves with the foregoing statement, which we think sufficiently embraces the essential facts necessary to give point to our views of this appeal.

Briefly summarized, the sheriff and the surety on his official bond were jointly sued; service was had on the surety, but the principal was not found; a judgment by default was taken against the surety at the return term; the surety appeared before the expiration of the return term and sought to have the judgment by default set aside, which the court denied. A writ of inquiry was awarded and the case continued. At the next term the motion to set aside was renewed, which was supported by the appearance of the sheriff ready to defend on the issue of liability, and the court again refused to set aside the judgment by default, and therefore the question of the liability of the sheriff was never tried by a jury. The jury considered the amount of damages alone for an admitted wrong inflicted upon the plaintiff by the negligence of the sheriff.

When the learned trial judge overruled the first motion to vacate the default judgment, he did so because he did not think that he was empowered to do so. In other words, the judge thought, and so stated, that he was entirely without discretion in the premises. Thus, in effect, saying that no matter what reasons could be or were given for a trial on the facts, he, the judge, acting in his judicial capacity, was powerless to set aside the default judgment. In this the judge was entirely mistaken. Whether he would have set aside the judgment if he had possessed the proper view of his power in the premises, we can only conjecture. We think, however, that his statement indicates that he would have acted differently.

Many facts were brought to the attention of the court, which we think should have influenced the judge to have both issues tried on the facts. It appears that the surety had a regularly retained attorney to look after

its interests in this state, and that this attorney was ill when the trial term was held in Simpson county, and it seems to us, viewing the record as a completed whole, that injustice was done to the surety company because it was not permitted to try its case, as a whole, and on its merits. An inspection of the record convinces us that a fair and impartial jury might have returned a different verdict, if it was permitted to try the whole case on its merits. The object of all courts should be to try all cases on their merits, if it is possible to do so without violence to the rules fixed by law for their guidance.

We have not discussed the several questions presented by the record because we deem it unnecessary at this time.

*Reversed and remanded*

---

DUFFEY v. KILROE.

[76 South. 681, Division A.]

1. EQUITY. *Amendment of bill. Exhibits.*

Even though a copy of a probated account sued on should have been filed with and as an exhibit to the bill, still it was not error for the court to allow the bill to be so amended as to refer to the account which was then on file as an exhibit thereto.

2. EXECUTORS AND ADMINISTRATORS. *Presentation of claim. Itemized account.*

Under Code 1906, section 2106, requiring an itemized account in probating a claim against the estate of a decedent, it is not necessary that a doctor's claim for visits to decedent should show the days of the month of such visits but where the visits are grouped on the account by months, the due date of each item will be held to be the first day of the month in which it is charged, in applying the statute of limitations.

## Syllabus.

[116 Miss.]

3. PAYMENTS. *Application.*

Payments made upon an open account should be applied to the oldest items on the account, where neither party makes an application to any particular item.

4. LIMITATION OF ACTIONS. *Effect of administration. Claims.*

Under Code 1906, section 3113, so providing, a debt not barred by limitation at the death of the debtor remains alive in any event for at least one year after the death of the debtor.

5. LIMITATION OF ACTIONS. *Effect of administration. Claims.*

Under Code 1906, section 2110, so providing the proper probaton and registering of claims against the estate of a decedent, stops the general statute of limitations against it.

6. LIMITATIONS OF ACTIONS. *Effect of administration. Claims.*

Code 1906, section 3105, providing that action may not be brought against an executor or administrator on a judgment or other cause of action against deceased, but within four years after the qualification of an executor or administrator is the only statute of limitations applicable after a claim not then barred by a general statute has been registered and probated.

APPEAL from the chancery court of Adams county.

HON. R. W. CUTREER, Chancellor.

Suit by Dr. E. P. Kilroe against Frank I. Duffy, administrator. From the decree, both parties appeal.

The facts are fully stated in the opinion of the court.

*Ratcliff & Kennedy*, for appellant.

*Reed, Brandon & Bowman*, for appellee.

SMITH, C. J. delivered the opinion of the court.

Mrs. Frances M. Botto, now deceased, was a woman of wealth, whose home was at Natchez, Miss., but who spent several of the later years of her life in the city of New York, during which time she was suffering from a disease because of which she demanded and received the daily professional services of appellee, a physician. The services rendered by appellee continued over a period of several years, and Mrs. Botto would make him

116 Miss.]

Opinion of the court.

payments thereon at intervals, which payments were credited by appellee upon his books to Mrs. Botto generally, neither she nor he applying them to any particular items of the account due him by her. Mrs. Botto died on the 15th day of May, 1914. On the 19th day of the same month appellant was appointed administrator of her estate; and on January 16, 1915, appellee's account for the professional services rendered by him to Mrs. Botto was duly probated, registered and allowed. The administrator declining to pay the same, this suit was instituted by appellee on the 16th day of June, 1915, which, in due course, resulted in a decree for appellee for about half of the sum sued for; the court holding that the remainder of the account was barred by the three-year statute of limitation. From this decree the administrator prosecutes a direct and Dr. Kilroe a cross appeal.

So much of the account probated as is necessary to understand the objection thereto made by appellant is as follows:

Mrs. Frances M. Botto to Dr. Edward P. Kilroe, Dr.  
To professional medical services rendered to  
said Mrs. Frances M. Botto by Dr. Edward  
P. Kilroe at her special instance and request

.....	\$31,684.00
Credits .....	20,085.00
Balance due.....	\$11,599.00

#### Itemized Statement of Account.

1908.	Day Visits, \$5.00.	Night Visits, \$10.00	
April.	63 visits at \$ 5.00.....	\$315.00	
	4 " " \$10.00.....	40.00	
			\$355.00
May.	63 visits at \$ 5.00.....	\$315.00	
	2 " " \$10.00.....	20.00	
			335.00

		Opinion of the court	[116 Miss.]
June.	59 visits at \$ 5.00.....	\$295.00	
	6 " " \$10.00.....	60.00	
			355.00
July.	46 visits at \$ 5.00.....	\$230.00	
	7 " " \$10.00.....	70.00	
			300.00
August	5 visits at \$ 5.00.....	\$ 25.00	
	1 " " \$10.00.....	10.00	
			35.00
September.	62 " " \$ 5.00.....	\$310.00	
	7 " " \$10.00.....	70.00	
			380.00

The remainder of the account is in the same form. The bill as originally filed contained the following allegation:

"The said account being for professional services rendered the said Mrs. Botto as will more fully appear by reference to the itemized account probated aforesaid, and which will be exhibited at the hearing of this cause, and complainant shows that said claim has been duly probated and registered, as will appear by reference to the register of claims, page 115, in the chancery clerk's office of said county," etc.

The account was not filed with the chancery clerk at the time the bill was, but during the progress of the trial it was filed with and so indorsed by him. Upon objection being made by counsel for appellant that the account had not been made an exhibit to the bill, the court below permitted an amendment to be made thereto at the close of the extract from the bill hereinbefore set forth, as follows: "And filed herewith as exhibit hereto."

On the direct appeal the only assignment of error argued by counsel for appellant is that:

"The court erred in admitting the probate account, it not being itemized as required by law, and it not having been filed with the bill of complaint as required by law."

This assignment of error presents two questions, in neither of which is there any merit.

Conceding, for the sake of the argument, that a copy of the account sued on should have been filed with and as an exhibit to the bill, the court committed no error in allowing the bill to be so amended as to refer to the account which was then on file as an exhibit thereto.

The objection that the account is not sufficiently itemized to comply with section 2106, Code of 1906, Hemmingway's Code, section 1774, is that the dates of appellee's visits to Mrs. Botto are not set forth. It is not necessary for the account to be so minutely itemized in order for appellee to recover (18 Cyc. 480; *Lehman v. Powe*, 95 Miss. 455, 49 So. 622), but because of appellee's failure to so itemize it, construing, as we must, the account most strongly against him, the due date of each item thereof must be held to be the first day of the month in which it is charged, and the statute of limitation must be applied accordingly.

The payments made to appellee by Mrs. Botto should have been applied to the oldest items of the account (*Fletcher v. Gillan*, 62 Miss. 8), and had this been done appellee and cross-appellant would have been entitled to a decree for the full amount claimed by him; for under the facts here presented the statute of limitation ceased to run against the account at, and did not again commence so to do after, Mrs. Botto's death, and the payments made by her covered all of appellee's charges for services rendered three or more years prior thereto. Under section 3113, Code of 1906 (Hemmingway's Code, section 2477), a debt not barred by limitation at the death of the debtor remains alive, in any event, for at least one year after the death of the debtor (*Clayton v. Merrett*, 52 Miss. 353; *Cook v. Reynolds*, 58 Miss. 243, and *Klaus v. Moore*, 77 Miss. 701, 27 So. 612), so that on the death of Mrs. Botto the general statutes of limitation ceased to run against appellee's account, and did not again begin so to do, for the reason that within one



year thereafter it was probated and registered as required by law. Section 2110, Code of 1906 (Hemmingway's Code, section 1778). After a claim not then barred by one of the general statutes of limitation has been probated and registered, the only statute of limitation which thereafter runs against it is section 3105, Code of 1906 (Hemmingway's Code, section 2469).

On the direct appeal the decree of the court below would be affirmed, but on the cross-appeal it must be reversed, and a decree will be rendered here for the cross-appellant for the amount sued for.

*Affirmed and reversed.*

---

WATTS v. SMYLIE. ET AL.

[76 South. 684, Division A.]

1. HABEAS CORPUS. *Custody of child. Right of mother.*

Upon the death of the father the duty of supporting the child devolves upon its mother, unless it possesses in its own right property sufficient for that purpose or is old enough and capable of earning its own living, and the mother is also entitled to its custody unless her character or surroundings are such as to unfit her therefor.

2. DIVORCE. *Custody of child. Rights of mother.*

Even though a mother failed to discharge her duty to her child during its father's lifetime, that fact would not absolve her from her moral and legal duty to support and care for it after its father's death, nor of itself alone deprive her of her right to its custody, after its father's death.

3. HABEAS CORPUS. *Judgment. Res judicata.*

Decrees in *habeas corpus* proceedings are *res adjudicata* only of the rights of the parties as the facts existed when the decree was rendered and not as they exist when the circumstances have changed.

116 Miss.]

Brief for appellant.

APPEAL from the chancery court of Amite county.  
HON. R. W. CUTTREB, Chancellor.

Proceedings in *habeas corpus* by Mrs. R. H. Watts against Mack Smylie and another. From a decree for defendants, plaintiff appeals.

The facts are fully stated in the opinion of the court.

*F. D. Hewitt*, for appellant.

It is the law, and has been in the state of Mississippi through all the ages, that the parents, if they be worthy, are entitled to have the custody and possession of their children. In fact the evidence is so strong in favor of the appellant, and it seems the law is so plain that the decision of the court was most arbitrary and exceeded the bounds of sound discretion. It seems that under the facts of this case that it is so plain that the decision of the court should be reversed that an extended argument would be unnecessary.

The true rule in cases of this kind is stated by WHITFIELD, C. J., in *Glidwell v. Morris*, 42 So. 537. The interest of the child is the controlling factor and the custody is determined solely by this question. In the case referred to Glidwell brought *habeas corpus* proceedings for the possession of his boy about two or three years old against the child's grandmother, Mrs. Jane Morris. The lower court awarded the custody of the child to its grandmother and the supreme court reversed that decision and gave the custody of the child to its father.

It is the law and has been that the father and mother or either of them, if they be living and suitable, should have the custody and possession of their children. *Moore v. Christian*, 56 Miss. 408, 31 American Report, 375.

In the instant case the testimony shows that the mother is in every way qualified, mentally, morally, spiritually and financially to rear and educate her boy; al-

though it is not denied that the child, John A. Smylie, Jr., is at present in a good home.

The law applicable to case of this kind is very well discussed and analyzed in *Hibbette et al. v. Baines*, 29 So. 80. Citing case of *Wier v. Marley*, 199 Mo. 494, and 6 L. R. A. 672, and a great many other authorities cited in this case. Section 2409 of the Code of 1906, says: "The guardian of a minor whose father or mother is living and is a suitable person to have the custody of the minor shall not be entitled as against the parent to the custody of the ward."

In the present case the guardian of the estate was not given the custody of the ward but the boy was given by his father before his death to the aunts and uncles and the mother was deprived of her baby boy and had been for three years.

The minor was taken from his mother between the age of three and four years and was taken against her wishes and placed with relatives, who being good people in every respect, knew nothing about the love of children and had no experience in raising children and teaching them the correct ideas of life.

The child has been deprived of the love and devotion of his father and mother, he has been deprived of the association of his brother, and is without a playmate, so necessary and essential to the welfare and well-being of a boy.

If there be no dispute of the facts when the question of the custody of a child is involved and the mother is one party and a collateral relative the other, as in this case, there certainly is no dispute of the law that the mother is entitled to and has the natural and legal right to the custody of her child. *Hibbette v. Baines*, 29 So. 80.

We respectfully submit that the case should be reversed and judgment entered here awarding the appellant the custody of her child.

*C. T. Gordon and R. S. Stewart, for appellee.*

It will appear by reading the latter petition the one upon which this appeal is taken, that the petitioner ask for a writ of *habeas corpus*, and did not file a bill of review or for review, but filed the petition *de novo*, and asked a vacation of the former decrees rendered in this matter; one while Mrs. Watts was the widow Smylie, and the other after she had married Mr. Watts, and in both of which decrees she was denied the custody of the minor, and in the second decree the bill was dismissed outright, and no appeal was taken from the same but appellant instead filed another original bill.

We submit first as a proposition of law, that the decree of the chancellor is right upon the pleadings, and any other decree, or a decree amending, vacating or avoiding the former decrees, could not have been granted, for there is no way to collaterally attack a decree; no motion was made or entered asking the cause to be remanded to the docket for further proof but simply a straight out and out bill filed to go over and rehash the same case that at least once had been heard.

The matters charged in this latter petition had twice been before the court, and in the first instance a temporary decree was granted, and in a petition to reopen this, a final decree was granted, dismissing the bill and taxing the complainant or petitioner with the cost but not satisfied, and directly in the face of this decree, another petition is filed, over the same matter, alleging substantially the same facts, and predicated upon the same grounds of action.

And we submit that the chancellor was correct in denying the relief therein prayed for, and in dismissing this third petition. It cannot be urged here that the bill was in effect a bill of review for under the facts as therein stated a bill of review cannot lie and a dismissal of the bill would have been proper.

“Bills of review will lie only for error of law appearing on the face or upon some new matter discovered after the decree and which could not possibly be used when the decree was made. *Vaughn v. Cutrer*, 49 Miss. 782; *Mayo v. Clancy*, 57 Miss. 674, and many other authorities.

Commencing with the case of *Foster v. Alston*, reported in 6th Howard, page 406, and decided in April, 1860, up to and including the last utterance by this court upon the custody of infants or minors, the court has uniformly held that the question of custody is to be determined solely upon the interest of the child or its best interest. See *Cocke v. Hannum*, 39 Miss. 423; *Maples v. Maples*, 49 Miss. 393; *McShan v. McShan*, 56 Miss. 413; *Fullilove v. Fullilove*, 62 Miss. 11; *Gildwell v. Morris*, 89 Miss. 82; *Wallace v. Wallace*, 46 So. 398; and *O'Neal v. O'Neal*, 48 So. 623.

And in a number of these cases the question as to the paramount right of father or mother to the custody of the child has been involved but in each instance, this paramount or supposedly paramount right of the one as against the other has given away to the “polar star” to wit: What is the best for the infant, or where would it be best circumstanced for the present and future?

The respondent did not undertake in the instant case to show the mother unworthy, did not undertake to show his superior ability, but did show that it was in a good home, that it was being cared for, and if carried with its mother, as she admitted, it would be a dependent upon a step-father who had never seen it or known it, and who had never manifested any interest in it at all, while if left where it was, it would be with an uncle, cared for and watched over by aunts, blood of its blood, flesh of its flesh, who loved it for itself and for their dead brother's sake.

The evidence, and the pleadings show that the mother lost her right when she dismissed her demand in the

court for the minor and permitted the father to bring it from Jackson to Amite county where it remained in the charge and care of its uncles and aunts who have taken a mother's place, the only mother the boy has ever known who he says that he loves and wants to stay with. Was the court wrong under the facts or the law in saying to this mother, you are the same person who had a chance to demand the baby when he needed your care, your love and attention, but forewent that chance and that right in order to get a divorce, and now since other hands have taken your place, since others have worked for and loved and watched over your baby, you must now leave him where it appears best for him. The court was within its discretion in such matters as these in looking into the past, present and future conditions and circumstances and in saying whether or not it was or would be best for the child that he be forced against his little will, to leave those who had been good to him and whom he loved and go to those who are strangers to him. *McShan v. McShan*, 56 Miss. 413. In the case of *Wallace v. Wallace*, 46 So. 398, the court as against the father's supposedly paramount right to his child, left it in the custody of the mother, though an invalid and whose end was expected soon, but who was looked after by her parents who were willing and able to help her and support and care for the child, and in passing said: "But in view of the fact that the grandmother and grandfather are closer to the child than the brothers of the father, who was to aid in its support and in view of the further fact that the child had spent practically all of its life in the immediate locality of its grandparents, and under their eye, it was best for the child to remain where it was." If so, if the grandparents who were willing to care for it, were to be preferred as against the child's uncle, then much the more should the uncle and aunt be preferred to a stepfather, be he ever so good, loyal and true.

Counsel for appellant lays a deal of stress upon the case of *Hibbette v. Baines*, 29 So. 80, but the facts in that case and upon which the father was awarded the custody of his children are so different from the facts here until the case is not applicable. In that case the father visited the children two or three times a year, and sent them money every month, even when he had bankrupted, and in every way showed that he was separated from his children simply because of the fact that his wife had died, and so soon as he had a home, and some one to look after it, he demanded them. But in the instant case, Mr. Smylie swears that the mother never sent her baby anything, never gave him clothes or made them for him, never came to see him, had nothing to do with him and while the mother contradicts this some, the court being the judge of facts, inclined to the respondent's version of the matter and so held. Too, the ties between the father and his children in the first case were kept alive, warm and strong by his frequent visits to them, by his presents to them, and his support of them, while in the instant case all such is utterly lacking.

In this case above cited, are found numerous authorities from other states, the facts in which in several instances or in many essentials similar to the facts in this instant case and in each of those cases the petition was denied.

After all is said, the main issue is, what was best for the child, then, what is the best now, and basing the future upon the past, what is best for the child in the future? Regardless of what a penitent mother may now say, back of all present pretensions, stands, ghost-like, the fact that when the baby needed mamma, she was willing and ready too, and did, surrender it to its father for a divorce.

SMITH, C. J., delivered the opinion of the court.

Appellant was formerly the wife of John A. Smylie, now deceased, of which marriage there was born in April, 1908, one child, John A. Smylie, Jr., the subject of this controversy. In May, 1912, she was granted a divorce from Smylie, the decree so adjudging containing no provision relative to the custody of the child, which was then about four years old, but the father retained its custody, by agreement with appellant, and placed it with appellees, his brother and sister, who gave him its board, he bearing its other expenses. The separation of appellant and Smylie occurred in the city of Jackson, where she continued to live during most if not all, of the time thereafter and prior to Smylie's death; but he removed to Amite county, taking the child with him, in which county appellees also reside. After their separation Smylie carried the child to see its mother three or four times. Smylie died on the 17th day of March, 1914, and on the 28th day of March appellant sued out a writ of *habeas corpus* before the chancellor, praying for the custody of the child, to which its uncle, Mack Smylie, only, was made defendant, resulting in a decree on the 3d day of the following month reciting that:

"The minor, John A. Smylie, be and for the present remain in the custody, charge, and care of the said Mack Smylie, the respondent herein. It is ordered further by the court, however, if it shall in the future appear that the relator is able financially, and so situated and proves herself a fit and proper person to have the charge, custody of the said minor and to care for it, in such manner as is best suited for the welfare, and future training, and nurture of the said minor, then in that event, the court orders further that the order this day given may be modified, changed, and altered so as to meet the law and facts that may be brought out in case said matter is reheard."



At that time appellant was without means of support except her own labor, but shortly thereafter she married R. H. Watts, her present husband, and thereupon filed another petition before the chancellor who rendered the former decree, setting up that fact, and praying that she be given the custody of the child, but which was again denied her by decree rendered on July 7, 1914. On the 10th day of June, 1916, she filed a third petition before the same chancellor, praying for, and was again denied, the custody of the child, and from the decree then rendered this appeal is taken.

Appellees, the child's paternal uncle and aunt, in whose care the father placed it, are people of high character, are properly caring for the child, and seem to earnestly and honestly desire to continue so to do. The child, who at the time of the trial was eight years old, is happy and contented and desires to remain with them.

Appellant and her husband are also people of equally high character, are happily married, and have a comfortable and well-regulated home. The desire of the wife to have the child with her meets with the husband's approval, and there is nothing in the record to indicate that this desire on the part of appellant for the custody of the child is promoted by any motive other than parental affection and the desire to discharge that duty to rear and care for it which is imposed upon her by the laws of both God and man.

Upon the death of the father the duty of supporting the child devolves upon its mother, unless it is possessed in its own right of property sufficient for that purpose, or is old enough and capable of earning its own living, and she also is entitled to its custody unless her character or surroundings are such as to unfit her therefor.

"A parent who is of good character and a proper person to have the custody of the child and reasonably able to provide for it is entitled to the custody as against other persons, although such others are much attached

to the child, and the child is attached to them, and prefers to remain with them, and they are in all respects suitable to have the custody of the child and able to support and care for it, and even though they are of larger fortune or able to provide for the child more comfortably than the parent, or to care for it better, or to give it a better education than the parent can afford." 29 Cyc. 1590; *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375; *Hibbette v. Baines*, 78 Miss. 695, 29 So. 80, 51 L. R. A. 839.

But it is said by counsel for appellees that appellant abandoned her child and thereby not only waived her right to, but demonstrated her unfitness for, its custody. The conduct of appellee cannot be so construed. All she did was to surrender the custody of the child to its father, whose right thereto was, to say the least, equal to hers, who, in addition, was charged by law with its support and maintenance, and who in the absence of evidence to the contrary, she had the right to presume would properly care for and support it. But even if she did fail to discharge her duty to the child during its father's lifetime, that fact would not absolve her from her moral and legal duty to support and care for it after its father's death, nor of itself alone deprived her of her right to its custody, which right she attempted to assert immediately after the father's death.

It is true:

"That the welfare and best interests of the child are the controlling elements in the determination of all disputes as to the custody. But nevertheless the court should always give the custody to the person having the legal right thereto, unless the circumstances of the case justify it, acting for the welfare of the child, in decreeing the custody elsewhere." 29 Cyc. 1594; *Hibbette v. Baines*, 78 Miss. 695, 29 So. 80, 51 L. R. A. 839.

It follows from the foregoing views that appellant is beyond doubt entitled to the custody of her child unless, as claimed, by counsel for appellees, the former

decrees are *res judicata* of her claim thereto. Even though the first decree rendered herein had not reserved to the court the power to thereafter modify its decree, under all of the authorities the former decrees rendered herein are *res judicata* only of the rights of the parties hereto as the facts then existed, and not as they exist two years afterwards when appellant's circumstances have changed, at least to the extent that it has now been demonstrated that the home which her present husband has made for her is and will continue to be such as will justify the court in awarding her the custody of the child.

*Reversed, and decree here for appellant.*

---

HENDRICKS v. KELLOG ET AL.

[76 South. 746, Division B.]

1. PROCESS. *Service of summons on absent defendant. Code 1906, Sec. 3926. Member of family.*

Under Code 1906, section 3926 (Hemingways Code, section 2933), providing that summons shall be served if the defendant cannot himself be found in the county, by leaving a true copy at his usual place of abode with some member of his family over sixteen years of age. A married woman having a husband and children, of her own living in the house of her unmarried sister who is absent as a domestic servant in California, was not a "member" of such unmarried sister's family.

2. PROCESS. *Service of absent defendant at usual place of abode. Statute.*

Under Code 1906, section 3926, providing that summons shall be served, if defendant cannot be found, or no member of his family, aged sixteen can be found at his usual place of abode who is willing to receive such copy, then by posting a true copy on a door of defendant's usual place of abode, where an unmarried woman owning a house in this state left it in the occupancy of her married sister's family and went to California as a domestic servant, remaining there for two years, and intending to remain for an indefinite time, his residence in California was her "usual place of abode" while she was away.

116 Miss.]

Brief for appellant.

3. **LIMITATION OF ACTIONS.** *Statute of limitation. Interruption by absence from state.*

Under Code 1906, section 3108, providing that, if the person against whom a cause of action has accrued be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action after his return, the phrase "be absent from and reside out of the state" in this statute applies to an unmarried woman who went to California to work as a domestic servant intending to return to this state when she had earned enough to pay off an incumbrance on her property.

APPEAL from the chancery court of Yazoo county.

HON. O. B. TAYLOR, Chancellor.

Suit by Rachel Hendricks against J. M. W. Kellog, executor and others. From a judgment dissolving an injunction, plaintiff appeals.

The facts are fully stated in the opinion of the court.

*Campbell & Campbell*, for appellant.

We agree with counsel for appellee in his brief, that the question involved in the litigation, is, whether legal service of process could have been had in this state, upon Rachel Hendricks, the appellant. The determination of this question is based upon the fact, whether or not, Rachel Hendricks had acquired a fixed residence, outside of the state of Mississippi, this is in accordance with the opinion of this court, in the case of *State v. Furlong*, 60 Miss. 845, the facts in the record show clearly that Rachel Hendricks had acquired no fixed residence outside of the state of Mississippi. On this proposition we cite the court to the following authorities:

In Massachusetts, however, it was held that a person who owned real estate in that state, on which he lived and carried on business until 1841, when he removed to another state, where he continued to reside, had at least a usual place of abode in Massachusetts in 1843. *Tilden v. Johnson*, 6 Cush. (Mass.) 354; *Lee v. Macvee* 45

Minn. 33; *Wood v. Roeder*, 45 Neb. 311; *Pendleton v. Vanausdel*, 2 Ind. 54; *Love v. Cherry*, 24 Iowa, 204.

Counsel for appellee quote extensively from *Alston v. Newcomer & Kausler*, 42 Miss. 186. We call the attention of the court to the important fact, that the facts in the above styled case are materially different from the facts in the instant case. In the case of *Alston v. Newcomer, & Kausler*, Mrs. Alston left the city of Jackson in 1853, taking her entire family with her, and stored her furniture in a different place in Jackson, and rented her house out to tenants who had been occupying it every since and she left none of her servants on the place. In the instant case Rachel Hendricks left all her furniture in her house, left her sister, and her sister's children, who had been members of her family, for a number of years, and took with her nothing but her wearing apparel, and expressed her intention to numerous parties, as shown by affidavits, to return to Yazoo City, as soon as she paid the encumbrances off of her property. But independent of this, the case of *Alston v. Newcomer & Kausler*, 42 Miss. 186, has been overruled by this supreme court in the case of *Lusby v. Railroad Co.*, 73 Miss. 360, 371;

In the last cited case the supreme court uses this language: "Perhaps the case most cited for the false view is that of *Railroad Co. v. Devaney*, in the book entitled 42 Miss. The case has no binding authority upon us, nor does the doctrine of *stare decisis* have any application in the case referred to, nor in any other case found in the so-called 42 Miss. The opinions found in that volume are the utterances of a tribunal appointed by the Military satrap who then ruled in a prostrate commonwealth and have no binding authority upon us than that each case therein must be regarded as *res adjudicate*." *Senoria v. Washington*, 73 Miss. 665.

Our recollections of appellant's testimony is, that she was employed as cook, by Mrs. Boothe and that she has

been employed as such servant for the past two years. We do not think that this fixes her residence in California. Her employment as a servant, necessitates her going with Mrs. Boothe wherever Mrs. Boothe might go, and the employment may be terminated at any time, and Rachel Hendricks may get employment elsewhere, and as stated in our original brief, our information, is that Mrs. Boothe has not continuously resided in California, but each year has spent a great part of her time away, taking Rachel Hendricks with her, as her servant. We think that the chancellor should have continued the injunction in force until the final hearing of this case.

*Holmes & Holmes*, for appellee.

It is conceded in the brief of counsel for appellant that she has been absent from the state of Mississippi, and physically living in California, since her arrival there in April, 1914, but it is claimed that the appellant had a domicile in Yazoo City, and that personal services of proceeds could have been obtained upon her, and that therefore the statute of limitations continued to run even during her absence from the state.

In the case of *Fisher v. Fisher*, 43 Miss. 212, this court held that the statute followed the person, and not the property, of the debtor, and that it is immaterial whether the debtor had property in this state liable to attachment.

In *French v. Davis*, 38 Miss. 218, the court held that the reason of the exception is, that during the absence of the debtor from the state the plaintiff cannot sue, and that if the right to sue be unimpaired notwithstanding the absence, the case is not within the section.

The appellant therefore predicates her whole case upon the proposition that during her absence from the state the plaintiff might have sued and obtained a personal judgment against her. She admits that this could not be done by personal service of process on the appel-

lant, but claims that under section 392 of the Code of 1906, there are three modes of obtaining process upon the defendants:

First. Upon the defendant personally if to be found in the county, by handing him a true copy of the process.

Second. If the defendant cannot himself be found in the county, then by leaving a true copy of the process at his usual place of abode, with his wife or some other person above the age of sixteen years, being one of his family, and willing to receive such copy.

Third. If the defendant cannot himself be found and if no person of his family aged sixteen years can be found at his usual place of abode who is willing to receive such copy, then by posting a true copy on the door of the defendant's usual place of abode.

As stated, it is conceded that process upon the defendant under the first head was impossible, because she was living in the state of California, but it is claimed that under the second and third methods, personal process might have been obtained by leaving a copy at her usual place of abode with some member of her family, or by posting a copy on the door of her usual place of abode.

Under the facts as shown by the record in this case, we deem it almost unnecessary to argue that any judgment obtained upon process of such character would have been absolutely void. It is true that appellant owned a house and lot in Yazoo City heavily mortgaged, and some furniture.

Under the second method of obtaining process, a true copy must be left "at his usual place of abode with his wife, or some other person above the age of sixteen years, being one of his family, and willing to receive such copy."

Now, the appellant is unmarried, and has never been married. She has no family or other dependants,

and it would have been impossible to leave the copy of the process with her husband, because she had none, or any member of her family above the age of sixteen years, because there were no such members. It is true that Alice Jennings, her sister, is living in the house with her husband and children, but Alice Jennings is not a member of the family of appellant. She is a member of the family of her husband, Tom Jennings. It may be true that Alice and Tom Jennings have children living in the house above the age of sixteen years willing to receive process, but these children are not members of the family of their aunt, Rachel Hendricks; they are members of the family of their father and mother, Tom and Alice Jennings.

Under the third method of serving process, the officer is required to post a true copy on a door of the defendant's usual place of abode. This was impossible for the reason that the defendant's usual place of abode in this case was at Mrs. C. B. Boothe's in Pasadena, California.

The argument in this case is that although the defendant admits that her usual place of abode was in California, admits that she was breathing, living and working in California, yet because of an intention to return to Yazoo City at some future date, her usual place of abode within the meaning of section 3926 was at a house where her brother-in-law and sister and nieces and nephews lived, and in the title to which she held an equity of redemption.

In the case of *Missouri, K. & T. Trust Company v. Norris*, 63 N. W. 634, 61 Minn. 256, the words "the house of his usual abode" within the meaning of the Minnesota statute, authorizing substituted service on defendant by leaving copy of process at the house of his usual abode, was held to be not an equivalent of domicile in all particulars, for one's place of abode does not necessarily continue until another one is ob-



tained. The court said that a tramp might have a domicile, but no house of his usual abode; that the term means a person's customary dwelling place of residence. *Ser v. Bobst*, 8 Mo. 506; *Appeal of Dunn*, 35 Conn. 82; *Mygatt v. Coe*, 44 Atl. 198, 63 N. J. Law, 510; *Earl v. McVay*, 91 U. S. 503, 23 Law Ed. 398; *Johnson v. Dadsden* (S. C.) 1 Nott & McC. 89; *Madison County Bank v. Suman's administrator*, 79 Mo. 527; *Blodgett v. Utley*, 4 Neb. 25.

It is clear from the foregoing authorities that it was impossible for the debtor in this case to be served with process, and that therefore, this case must be affirmed, as the appellant has staked her whole case upon the sole proposition that a valid service of process might have been obtained upon her, even though she was absent from the state. But we come now to a construction of section 3108 and our decisions under it, from which we think it clear that the appellant is absent from and residing out of the state so as to prevent the running of the statute of limitations.

The case of *Dent v. Jones*, 50 Miss. 265, was that of a debtor who had a home in this state, and who went on a trip abroad. The court held that his absence on his trip was not sufficient to stop the running of the statute.

In the case of *State v. Furlong*, 63 Miss. 839, the court held that if the debtor have no such residence here as to enable the creditor to obtain process upon him and be absent, the section applies even though it be shown that the debtor had not acquired a domicile or fixed residence abroad.

In the case of *Wielle v. Levy*, 74 Miss. 34, 20 So. 3, the court held that where the defendant contracts a debt and removes to another state, and afterwards visits this state as a traveling salesman, going from place to place and staying only a day or two at each place, though while thus occupied he remained in the state continu-

116 Miss.]

Opinion of the court.

ously for several months, he is absent within the meaning of the statute.

Section 3108 says that if the defendant "be absent from and reside out of the state, the time of his absence was not to be taken as any part of the time limited for the commencement of the action, after his return."

It is worthy of note in this case that the debtor has not yet returned, and does not know when she will return. There is no doubt about the fact that the debtor has been absent from and residing out of the state of Mississippi. Even though it might be held that the domicile of the appellant remained in the state of Mississippi, yet she was absent from and residing out of the state. *Alston v. Newcomer & Kausler*, 42 Miss. 186; *Foster v. Brisbin*, 19 Wend, 14; *Haggart v. Morgan*, 1 Selden, 423; *Riswick v. Davis*, 19 Maryland, 82; *Drake on Attachment*, sec. 57; *Mandell v. Peet, Sims & Co.*, 18 Ark. 236.

It is respectfully submitted that the judgment of the lower court should be affirmed.

ETHRIDGE, J. delivered the opinion of the court.

On the 9th day of March, 1909, Rachel Hendricks, of Yazoo City, Miss., executed two promissory notes to Mrs. Mary R. Miles, one for three hundred seventy-eight dollars and eighty cents, payable one year after date, and one for two hundred thirty-four dollars and thirty-nine cents, payable two years after date, securing these notes by a deed of trust on property situated in Yazoo City, Miss. In the year 1913 Rachel Hendricks accompanied her niece to California, seeking to improve the health of her niece, but returned to Yazoo City in the fall of that year. This trip required considerable money and Rachel Hendricks incurred other indebtedness, securing the same with a deed of trust upon her homestead. In April, 1914, Rachel Hendricks, having an op-

portunity to secure a position in California at better wages than she could get in Mississippi, moved to Pasadena, Cal., and secured employment as a servant with a lady in that city. She remained in California from April, 1914, until the date of hearing of this suit, but claims that she did not surrender or abandon her residence in Mississippi, but left her house in Yazoo City in charge of her sister and her husband and family. In July, 1916, the executor of Mrs. Mary Miles, deceased, having qualified as executor directed the trustee in the deeds of trust to secure the notes above mentioned to proceed to sell the property to pay the debts. Rachel Hendricks, through her attorneys, sued out an injunction against the sale of said property, claiming that the first note above given had become barred by the statute of limitations, and before suit tendered to the trustee the amount of the second note secured by the deed of trust, with interest, in full settlement of her demands, which the trustee refused to accept, and the said money was paid into the chancery court with the filing of the bill for an injunction.

It is claimed in the bill that the statute of limitation had run against the first note, that it constituted no claim against the homestead. There was a motion filed to dissolve the injunction, and on this motion affidavits of various parties were filed, relatives mainly of Rachel Hendricks, which undertook to state that the sister of Rachel Hendricks occupied her residence as members of her family; and by reason of this contention it is claimed that process could have been served in Yazoo City upon Rachel Hendricks, and her absence did not suspend the running of the statutes of limitation of this state, under the provisions of section 3108, Code of 1906 (section 2472 Hemingway's Code).

In the deposition of Rachel Hendricks she was interrogated as to her stay in California, the nature of her employment, and the length of time she expected to re-

main. In answer she said that she could not answer how long she expected to remain; that her employer was Mrs. C. B. Boothe, 1515 Garfield avenue, South Pasadena, Cal. She was then asked, "State where has been your usual place of abode during the last two years," and answered, "At Mrs. C. B. Boothe's."

On the hearing the chancellor dissolved the injunction and granted an appeal to settle the principles of the case.

Section 3108, Code of 1906 (section 2472, Hemingway's Code) is as follows:

"Absence from the State.—If, after any cause of action have accrued in this state, the person against whom it has accrued be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action, after his return."

Under this statute we are called upon to determine whether the phrase "be absent from and reside out of the state" shall apply to the facts of appellant's living out of the state temporarily under the circumstances stated, she intending to return to Mississippi when she has earned enough to pay off the indebtedness upon her property.

Our statutes upon the service of process provide three methods of serving process upon a defendant, any one of which will confer jurisdiction upon the court to render a personal judgment. Section 3926, Code of 1906 (section 2933, Hemingway's Code), is as follows:

"How Summons Executed.—The summons from every court shall be served in one of the following modes:

"First.—Upon the defendant personally, if to be found in the county, by handing him a true copy of the process.

"Second.—If the defendant cannot himself be found in the county, then by leaving a true copy of the process at his usual place of abode, with his wife or some other

person above the age of sixteen years, being one of his family, and willing to receive such copy.

“Third.—If the defendant cannot himself be found, and if no person of his family aged sixteen years can be found at his usual place of abode, who is willing to receive such copy, then by posting a true copy on a door of the defendant’s usual place of abode.”

Can it be said that the sister of the appellant, who is a married woman having a husband and children of her own, constitutes a member of the appellant’s family within the meaning of said section? And if not, is the house of the appellant in Yazoo City, occupied by her sister and husband under the circumstances stated, the “usual place of abode” at which a copy of summons may be posted?

We do not think the sister of appellant, having a husband and children, is a member of appellant’s family in the sense contemplated by the statute in reference to whether this house of appellant in Yazoo City, occupied by her sister, is the usual place of abode or residence of the appellant at which a notice may be posted. The appellant having engaged in employment in another state, at a fixed place, and remaining there for two years, and intending to remain for an indefinite time, in the future, we are of opinion that such place in such state would be her “usual place of abode” at the time this suit was filed. We think the case falls within the principles announced in *Alston v. Newcomer & Kausler*, 42 Miss. 186.

It will be noted that the note became due March 9, 1910, and would become barred by our six-year statute of limitation on March 9, 1916, if the appellant actually lived in Mississippi, provided the statute was not suspended by some other cause.

It follows from what we have said that the judgment of the chancery court was correct, and the cause is affirmed.

*Affirmed and remanded.*

## PRUITT, CONSTABLE v. STATE.

[76 South. 761, Division A.]

1. **OFFICERS. Removal from office. Indictment. Sufficiency. Code 1906, Section 1309.**

Under Code 1906, section 1309, providing that an officer who shall be drunk when called on to perform the duties of his office shall be removed, it is necessary that the indictment should set out the particular duty which the defendant was called upon to perform at the time he is alleged to have been drunk.

2. **SAME.**

It is a universal rule that it is essential to the validity of an indictment that the material facts constituting the offense must be alleged with certainty.

3. **SAME.**

Merely being drunk occasionally, while not discharging a duty, nor being called upon to do so would not come within the statute.

4. **INDICTMENT. Insufficiency. Curing by bill of particulars. Code 1906, Section 1309.**

Where an indictment under section 1309, Code 1906, providing for removal of officers if drunk when called upon to perform a duty was insufficient for not alleging the particular duty the officer was called upon to perform, such indictment was not cured by a bill of particulars furnished by the district attorney.

5. **STATUTE. Indictments. Additional averments.**

It is well settled law in this state that indictments under a statute must go further than the language of the statute where it is necessary to charge the facts in order to inform the accused of the nature and cause of the accusation.

APPEAL from the circuit court of Jones county.

HON. PAUL B. JOHNSON, Judge.

W. A. Pruitt, a constable, was convicted of being drunk when called upon to perform a duty of his office and appeals.

The facts are fully stated in the opinion of the court.

116 Miss.—3

R. L. Bullard, for appellant.

The demurrer to the indictment ought to have been sustained for two reasons: (A) It does not specify the official duty the defendant was called upon to perform; and, (B) It is not alleged that it occurred within the territorial limits of Pruitt's official authority.

It is elementary that whatever is necessary to be established in evidence is necessary to be alleged in pleading, and especially is this true in criminal law. The section of law in question makes it an offense for an officer to be drunk, "when called upon to perform the duties of his office." Now if it should be held that the offense is not complete if one is merely drunk when called upon to perform one or two of his official duties, then this indictment would be sufficient, for it charges, in effect that he was called upon to perform all the duties of his office at one and the same time. But this is absurd. No one will contend that guilt will not attach to any officer who is drunk when called upon to perform any duty of his office. Therefore, under the familiar rule that when indictments are drawn under statutes thus broad, the pleader must go beyond its mere wording to the specific act or thing, it was necessary to specify the particular act he was called to perform.

And it does not help the indictment that a bill of particulars was furnished. A bill of particulars, always largely within the discretion of the court, is designed to aid the defendant during the trial. It is of a temporary nature, may be amended, stricken from the record, withdrawn, modified or dealt with in many ways. When the trial is over, its office is done, while the indictment is a forever-lasting record, which together with the judgment, constitutes the defendant's bulwark against future prosecutions for the same offense, and in the performance of this office it stands alone.

The foregoing propositions, and their applicability, rest upon elementary principals of pleading and construction that are familiar, and as there is nothing here but for the court to determine whether or not the principal is of enough importance to necessitate a reversal. I will not discuss them further. I cannot contend that, so far as his counsel and the actual trial was concerned, the defendant was prejudiced thereby, but it does not follow that he may not be indicted again. Then he would experience the deep need of an indictment that was sufficiently specific.

I submit that for the failure of the evidence to show that he was called upon to perform any official duty, the defendant ought to be discharged, but that in any event the cause ought to be reversed.

*Earl N. Floyd*, for appellee.

The appellant interposed a demurrer to the indictment, the overruling of which constitutes the first of the alleged errors argued in his brief. He argues that the indictment is insufficient in that (1) it does not specify the official duty the appellant was called upon to perform; and (2) it is not alleged that it occurred within the territorial limits of Pruitt's official authority. The indictment, *supra*, alleges that on the 26th day of February, 1917, the appellant was called upon to perform the duties of the office, without describing further the specific duties in question. However, a bill of particulars was furnished by the state, as shown by page 8, of the record, setting out in full detail the nature of the duties, and the appellant cannot be heard to say that he was not sufficiently apprised of the nature of the accusation against him.

The evidence shows that the state offered abundant proof of the appellant's intoxication and that if the facts testified to be believed to be true, the appellant was



beyond question in the condition of drunkenness contemplated by the statute under which he was indicted. The case presents no necessity for defining the twilight zone between exhilaration and intoxication as the evidence measures up to every requirement of the latter term, however, if the court desires authorities on this point, I refer them to the case of *State ex rel. v. Baughn*, 143 N. W. 1100 50 L. R. A. (N. S.) 912.

The whole evidence considered, I submit that none of the errors assigned by the appellant are well taken and that since the evidence shows rather conclusively that the appellant was drunk when he was called upon to attend to an official duty during the business hours of his office, the verdict of the jury and judgment of the court removing him from office should be sustained by this court.

HOLDEN, J., delivered the opinion of the court.

This is an appeal by W. A. Pruitt, a duly elected, qualified, and acting constable of the second district of Jones county, who was convicted on a charge of being drunk when called upon to perform the duties of his office. The record shows that a local justice of the peace issued a writ of attachment and delivered it to appellant to be served by him. Appellant did not serve the writ, but turned it over to a doctor whom he attempted to deputize to serve it; appellant claiming that he refused to serve it because it was void. It does not appear how the doctor could have made it valid. The state contended and offered proof tending to show that the reason appellant did not serve the writ was because he was drunk at the time. The doctor returned the writ to the justice of the peace. There was a sharp conflict in the testimony as to whether or not appellant was really drunk at the time when he was called upon to perform this duty of his office. Several

witnesses testified for the state that in their opinion the appellant was drunk on that occasion, and stated that they were with the appellant, and saw, heard, and smelled the evidences of drunkenness manifested by the appellant. This proof by the state was disputed by several witnesses who testified for the defendant below. The appellant Pruitt testified in his own behalf that he was not drunk, and that during the day he had taken only one "pretty good sized drink of sorry whisky and felt the effects, and it flared up in his face," but that he was not in fact drunk. It is in proof that appellant had a natural florid complexion, and that this color of the appellant's face on this occasion was probably deceptive, and that such appearance was not caused by intoxication, but was on account of nature's provision. We also observe that the alleged offense here occurred during the Christmas holidays.

The indictment is based upon section 1309, Code 1906, which reads: "Any officer who shall be guilty of habitual drunkenness, or who shall be drunk while in the actual discharge of the duties of his office, or when called on to perform them, may be indicted therefor, and upon conviction, shall be removed from office."

The indictment charging the offense is as follows: "The grand jurors of the state of Mississippi, elected, summoned, impaneled, sworn and charged to inquire in and for the Second judicial district of Jones county, state of Mississippi, at the term aforesaid, of the court aforesaid, in the name and by the authority of the state of Mississippi, upon their oaths present that W. A. Pruitt, on the 26th day of February, 1917, in the county and district aforesaid, was the duly elected, qualified, and acting constable of justice of the peace beat No. 2 in said county, and holding such office was called upon to perform the duties thereof, and when so called upon was then and there unlawfully drunk, against the peace and dignity of the state of Mississippi."

The appellant complains here that several errors were committed by the lower court; but we deem it unnecessary to consider but one of these assignments and that is, it is contended by appellant that the lower court erred in overruling the demurrer to the indictment, because the indictment failed to charge the particular official duty, or duties, that the appellant was called upon to perform at the time that he is alleged to have been drunk. When the demurrer to the indictment was overruled by the lower court, the district attorney furnished the defendant with a bill of particulars, stating specifically what official duty the defendant was called upon to perform at the time he was drunk, which duty was to serve a writ of attachment. The case then proceeded to trial, which result in a verdict of guilty, and judgment.

It will be observed from a careful reading of section 1309, Code 1906, that the statute provides that an officer may be guilty under any one of three different states of facts. That is, he may be guilty of habitual drunkenness; or he may be guilty if he is drunk while in the actual discharge of the duties of his office; or he may be guilty if he be drunk when called upon to perform any one of the duties of his office.

The indictment in this case is based solely upon the latter clause; that is, that the defendant was drunk when called upon to perform one of the duties of his office. This being true, it was necessary that the indictment set out the particular duty which the defendant was called upon to perform at the time that he is alleged to have been drunk. It is a universal rule that it is essential to the validity of an indictment that the material facts constituting the offense charged must be alleged with certainty. If the rule were otherwise, former jeopardy could not be subsequently availed of by the accused on indictment for the same offense. In the case before us the rule is peculiarly applicable, for the reason

that the official duties of the appellant were numerous and different, and it was his right to know from the indictment what particular official duty he was called upon to perform while drunk. Merely being drunk occasionally, while not discharging a duty, nor being called upon to do so, would not come within the statute.

The bill of particulars furnished by the district attorney, setting out the particular duty that the defendant was called upon to perform while drunk, did not cure the fatal defect in the indictment, for the very simple reason that the duty which the defendant was called upon to perform as set forth in the bill of particulars furnished by the district attorney may not have been the particular duty which the grand jury had in mind when it returned the indictment in the case. In furnishing the bill of particulars the district attorney attempted to do that which only the grand jury could do; that is to definitely charge the particular duty the defendant was called upon to perform while drunk.

It is contended by the state that the indictment is sufficient, as it follows the language of the statute, and that, furthermore, the bill of particulars supplied the defect, if any, in the indictment. This contention cannot be upheld, as it is well-settled law in this state that the indictment must go further than the language of the statute where it is necessary to charge the facts in order to inform the accused of the nature and cause of the accusation. It clearly appears that the language of the statute here in question is such as to make it necessary for the indictment to definitely set out the facts sufficiently to inform the accused of the specific offense charged, so that he may properly prepare his defense thereto and be able to successfully plead former jeopardy. As we have already stated the bill of particulars did not, and cannot, cure the defect in the indictment. Therefore we hold that the indictment in this case is

fatally defective, and the lower court erred in overruling the demurrer filed thereto.

The lower court having erred in overruling the demurrer to the indictment, the judgment will be reversed, and the case remanded.

*Reversed and remanded.*

---

LOUISVILLE & N. R. Co. v. JOULLIAN.

[76 South. 769, Division B.]

**RAILROADS. Right of way. Malicious destruction of property. Liability.**

Where a violent storm, dragged plaintiff's schooners from his canning factory and left them upon defendant's railroad track and the wrecking crew of the railroad company, wilfully and wantonly destroyed them at a time when there was no through traffic and the regular trains of defendant did not have occasion to pass until many days after the boat had been destroyed and there was time for the railroad company to have employed the service of those who knew how to jack up and remove the boats from the right of way or to permit plaintiff to do this work himself which could have been done in six hours. In such case defendant was liable in damages for the reckless destruction of plaintiff's property.

APPEAL from the circuit court of Harrison county.  
HON. J. H. NEVILLE, Judge.

Suit by J. F. Joullian, against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*Gregory L. Smith* and *Joel W. Goldsby*, for appellant.

The evidence shows, without contradiction, that the appellant's servants used every means within its reach, and as well as its best skill and material and labor a-

available for the purpose of getting the vessel off of the track without injury to it, and during this whole time appellee and his father, who were familiar with the handling of boats, were in the same neighborhood, were advised of the condition and position of the boat as well as the surroundings, and made no effort either to remove the boat themselves, or to direct the appellee's servants in removing it.

The sixth and seventh assignments of error are well taken and should be sustained. While it may be true that the appellant would not have been justified in unnecessarily doing injury to the property of the appellee, yet it had a right to protect its own property even at the expense and loss of the appellee, as is clearly established by the evidence in this case. *Beach v. Schoff*, 28 Pa. 195, 70 Am. Dec. 122.

And the refusal of the charges asked by the appellant as set out in the transcript of the record in the sixth and seventh assignment of error, was error in that they withdrew material questions from the consideration of the jury, and the court erred in so doing it and said assignments of error should be sustained. *McKeesport Sawmill Co. v. Pennsylvania Co.*, 122 Fed. 185-6 and 7.

As we understand the law, as plainly set out by the authorities, it was the duty of the appellee to move, at the earliest possible moment, and to be extraordinarily diligent in the removal of his vessel; that if he failed in that duty, the appellant was not bound to use the highest skill; that it was not bound to have skilled workmen and the best appliances to meet the emergency, but it was only necessary to have such persons and material as were available to it, under the surrounding circumstances, in attempting to remove the vessel from the track and that if it could not move it, under the circumstances of this case with the labor, skill and material which it had available, it had a right to destroy the vessel in order to clear its track,

under the circumstances as set out in the evidence in this case.

We respectfully submit that the judgment of the circuit court should be reversed.

*Dodds & Montgomery*, for appellees.

The third and fourth assignment of error attack the two instructions given for plaintiff and set out on pages 12 and 13 of the record. These instructions were drawn according to the rule laid down in the case of *Postal Telegraph and Cable Company v. Gulf & Ship Island Railroad Company*, 110 Miss. 770, 70 So. 833, where this court held that the Telegraph company had wrongfully strung its wires along and upon the right of way of the Gulf & Ship Island Railroad Company, and was therefore a trespasser. But the court held that the railroad could not use excessive force in the removal of the wire and was liable for damages caused by its own arbitrary destruction of the wire. *Postal Telegraph and Cable Company v. Gulf & Ship Island Railroad Company*, 110 Miss. 770, 70 So. 833.

This Postal Telegraph case cites with approval 38 Cyc. 1053, as the proper rule. We quote from this citation as follows: "Right *in rem* of defendant to realty not in possession of another. (1) In general. An owner of land may justify the removal of chattels which are wrongfully on his lands, however, but care must be used in the removal and it should be effected with as little injury to the chattels removed as is possible, and without the exercise of excessive force. 38 Cyc., page 1053.

We submit that appellee's instructions come squarely within the rule laid down by this court, and it was the theory of the defendant as shown by its notice under the general issue which is set out on page eight of the record, that the defendant used all its available

means and skill on hand and could not clear its tracks without destroying this boat. This theory was fully and squarely presented to the jury by instructions number four and six requested by and granted to defendant. These instructions are set out on pages sixteen and seventeen of the record.

Appellant cites two Pennsylvania cases, and contends for the rule there laid down. We submit to the court that in both of these cases the property of the defendant was greatly endangered and imperilled by the property of the plaintiff and its destruction was necessary to preserve from destruction the property of the defendant. This rule is a good one, founded on reason and common sense. We think it a good rule, but we submit that it does not touch this case top, side, nor bottom.

The conflict in the testimony having been decided by a jury, the instructions for plaintiff having been drawn squarely within the rule; and the whole theory of defendant having been fully presented to the jury by its own instructions, we submit that the case should be affirmed.

STEVENS, J., delivered the opinion of the court.

While there are two cases, and a separate appeal in each, both will be disposed of in one opinion. The testimony in the two cases is slightly different, but the same legal principle controls the disposition of both appeals.

In September, 1915, a storm of great violence swept the Gulf Coast. During this storm two schooners belonging to the appellee, Mr. Joullian, were dragged from a certain canning factory of appellee across the marshes until they struck and were deposited upon the railroad of the appellant. The schooner *Two Sons*, the value of which is sued for in cause No. 19,730, was carried a distance of three-fourths of a mile, while the other boat, the schooner *Gabriel*, was taken from her



moorings in the bayou and carried about a mile. After the storm had subsided, the employees of appellant, in clearing and repairing the track and rebuilding bridges, found both boats upon the track, and in order to clear the track, destroyed the plaintiff's property. The schooner Two Sons was, according to the testimony offered for the plaintiff, "busted to pieces and burned," while the schooner Gabriel was sawn in two and burned. Thereafter Mr. Joullian instituted separate suits for the value of the boats and recovered judgment in each case, from which the present appeals are prosecuted.

The evidence being in conflict, we must take the case as made by the plaintiff's testimony. This testimony tends to prove that the wrecking crew of appellant willfully and wantonly destroyed the plaintiff's property. This being true, disposition of these appeals would not be controlled by the case of *McKeesport Saw-mill Co. v. Pennsylvania Co.* (C. C.), 122 Fed. 185, and the authorities referred to by ARCHBALD, District Judge, in the opinion, upon which counsel for appellant rely. In the case just referred to, the railroad company in repairing a bridge across a stream had constructed certain false work for the bridge. A runaway coal barge floated down and against this false work, and endangered defendant's property. Not only was there immediate danger to the construction work of the railroad company but the proof showed, and the opinion states, that:

"There is no suggestion that it (the barge) was wantonly destroyed, and the evidence shows that it was cut to pieces only after other means had been tried and failed."

The boat there was "a floating nuisance." In the present case the testimony shows that the railroad bridge at Bay St. Louis on the north and the railroad bridge at Rigolets, in the direction of New Orleans, were both swept away by the storm, and the two boats involved in this litigation lay upon that part of the main

line of the railroad between these two bridges. At the time the boats were destroyed there was no through traffic, and the regular trains of appellant did not have occasion to pass until many days after the boats had been destroyed. In other words, there was time for the railway company to employ the services of those who knew how to jack up and remove the boat from the right of way, or to permit the plaintiff to do this work for himself. The proof shows this could have been done in six hours. This is the case as made by and for the plaintiff. There is also testimony in one of the cases tending to show that appellant had a passing unobstructed side track at the point where one of the boats lay. The proof justifies the conclusion that the foreman of appellant was reckless and employed unnecessary force in removing the obstructions. The boats were deposited upon the railroad track through no fault of either party. The instructions given the defendant were liberal and favorable. Two of these instructions advised the jury that:

"It was the duty of the plaintiff to remove said boat at the earliest possible moment, and to use extraordinary diligence in said removal, and if the plaintiff failed \* \* \* that the defendant had a right to remove said boat, and that in so removing it, it was not bound to use the highest skill, either of workmanship or appliances, that it was only bound to have such ordinary and careful men and such appliances, which under the circumstances and the time and place were immediately available to it, for the purpose of moving said boat."

While the present cases are somewhat different from, yet they are within, the principle approved by our court in *Postal Telegraph-Cable Co. v. Gulf & Ship Island R. Co.*, 110 Miss. 770, 70 So. 833.

*Affirmed.*

## RUSSEL ET AL. v. TOWN OF HICKORY.

[76 South. 825, Division B.]

1. QUIETING TITLE. *Complainant. Sufficiency.*

In all suits to confirm title or to remove clouds it is the duty of the complainant to deraign title and in deraigning title, a general statement that the complainant is the real owner is insufficient.

2. QUIETING TITLE. *Complainant. Sufficiency. Code 1892, Section 4011.*

Where the town of Hickory a municipal corporation filed a bill alleging that it was the owner of certain school property and that defendants had taken possession of such property and that complainant was entitled to an injunction restraining defendants from trespassing thereon, and praying a decree removing any cloud from its title. The bill alleged that the land had been conveyed to the trustees of the Hickory Institute, and their successors in office in 1889 for the benefit of the citizens of Hickory and the surrounding community and while it did not so specifically aver, it appeared that defendants claimed title from the same source under a clause providing for forfeiture when the property should be abandoned for educational purposes. The conveyance was made before the enactment of Code of 1892, section 4011, authorizing a municipality to become a separate school district and before the enactment of section 3343, Code 1906, authorizing municipalities "to erect, purchase, or rent school houses" and the bill did not aver that the property had been deeded to the municipality for school purposes. In such case the bill was insufficient to show that the municipality had title to the property.

3. INJUNCTION. *Remedy. Scope.*

The law is well settled that a defendant in possession under a *bona-fide* claim of title should not summarily be removed by mandatory process in the chancery court, especially where there is no averment that irreparable damages will be done the complainants.

APPEAL from the chancery court of Newton county.  
HON. A. Y. WOODWARD, Chancellor.

Bill by the town of Hickory against Frank Russel and another. From a decree overruling a demurrer to the bill, defendants appeal.

The facts are fully stated in the opinion of the court.

*Robt. L. Bullard*, for appellant.

The allegations of the bill show that title to the property in question passed from Russel to Todd, Harper, Hanna, Buckley and White, the trustees of the Hickory Institute; it has not shown that it passes from them to the town of Hickory; therefore the town of Hickory has no title whatever to the property, it is a mere interloper.

In addition to all this, there are a few elementary legal propositions that require the citation of no authority in their support; viz: No trespass to real estate will ever be enjoined at the suit of one who does not show in himself a clear title. No trespass to real estate that does not amount to waste will be enjoined in any event. Waste will not be enjoined unless it amounts to irreparable injury, and, no one in possession of real estate under a claim of right or title, will ever be put out by injunction, and a trespass by one who claims title will not be enjoined except where the trespass would amount to irreparable waste and then only at the suit of one showing an indisputable title in himself.

Now this appellee not only shows that it has no title to the property, but the bill shows that the appellant has a most lively claim of title which a trial of it, if one were offered, might demonstrate to be perfectly valid. He has the "nine points in law," possession, along with his claim that the condition of the deed has been forfeited. When he saw that the condition had been broken he exercised the right which the law has given him from time immemorial, that of re-entry. The bill alleges that he "has taken possession of the property and fenced it up" that is, he had re-entered it. The bill does not allege that he has done, or even threatened to do, more than re-enter. He has not done the freehold any injury, nor threatened to do it any. He has done nothing more than assert his right and title to the property because of the breach of a condition of his deed, and to enjoin him from

doing this is to enjoin him from exercising the very remedy, and the most appropriate remedy, the law gives him, and there was never a court of equity that would oust him from the assertion of this right at the behest of one claiming title, much less one who shows the doubtful and legally impossible nature of his own claim.

I cannot better conclude this brief than by a quotation from this court in the case of *Poindexter v. Henderson*, S. W. 176 12 Am. Dec. 550, wherein it is said: "The only question submitted to the consideration of the court, is, whether the complainant is entitled to an injunction to stay waste, when the defendant is stated to be in possession and holds under an adverse claim. We think not and we are supported in this opinion by all the adjudged cases in England and America.

In *Pillsworth v. Heapton*, 6 Ves. Jun., Lord Chancellor ELDON says: "I do not recollect that the court has ever granted an injunction against waste under any such circumstances. I remember perfectly being told from the bench, very early in my life, that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction. See also, *Davis v. Lee*, same authority. So in the case of *Horway v. Howe*, 19 Ves. Jun. if the bill contains a statement, admitting even the pretense of a claim on the part of the defendant, the plaintiff will have to go out of court. In the case of *Stone v. Maun*, 4 Johns. Chan; an injunction to stay waste will not be granted when the title of the plaintiff is doubtful, and when the defendant is in possession by an adverse claim.

In the case before us, there is a controversy about the right and title to the land in question as appears by complainant's own showing.

"Under such circumstances we cannot do otherwise than affirm the decree of the court below (dismissing the bill). If this was an application for an injunction to stay

the hand of a lawless trespasser, the court would be still more circumspect in compelling the plaintiff to show unquestioned evidence of title. The reason of the rule must be obvious. The party complaining could not invoke the aid of the chancellor, unless it be a case of irreparable injury, etc."

In this case the complainant has shown that it has no right to the injunction for three sufficient reasons, viz; It has no title to the land; the respondent is in possession under an adverse claim, and no damage has been done, or threatened, to the property.

There are instances where irreparable waste will be enjoined while a suit to try the title is pending, as in *Freemans v. Ammons*, 91 Miss. 672, but never was the possession of one claiming an adverse title interfered with by injunction. *Poindexter v. Henderson*, S. W. 176 12 Am. Dec. 550; *Skipworth v. Dodd*, 24 Miss. 487, and *J. E. North Lumber Co. v. Gary*, 83 Miss. 640.

I most respectfully submit that the decree of the chancellor ought to be reversed and the bill dismissed.

*Jacobson & Brooks*, for appellee.

The appellant urges in this cause that the original bill of complaint does not show that the complainants in this cause owned this property or had any interest in it. If appellant is correct upon this proposition then no one owned any interest in it.

The chain of this title is traced into the Russells. It is charged that the land was entered from the United States government and that title to this land became vested in one Frank Russell, the defendant in the court below and one of the appellants here. It is charged further that Russell and his immediate venders had been in open, notorious possession of the property for a period of more than thirty-one years. It is charged further that Russell deeded this land to the trustees of the Hickory Institute and their successors in office. It is then charged that

the trustees of the Hickory Institute and their successors in office are one and the same persons as the present trustees, who are the complainants in this cause and who are appellees. The appellants admit the allegation in the bill cover these facts but seek to avoid that by saying that such a thing is impossible. We disagree with them. This institution at one time was known as the Hickory Institute. It is now known as the Hickory High School. The trustees of the Hickory Institute in 1889 were the vendees of this deed, and where the Hickory Institute becomes the Hickory High School. The bill in short, concise, crisp language affirmatively says that these two institutions are one and the same and the successors in office of a trustee of the Hickory Institute is a present trustee of the Hickory High School, and we do not agree with counsel in his statement of the case or his conclusions thereunder. We submit that the traditional wayfaring man, according to our contention, ought to see clearly that the original bill is not defective upon this proposition.

It is our view that if the decisions are reaffirmed as layed out in the case of *Buck v. City of Macon*, this case is settled, because it is our contention that the title to this property has become vested without hope of reverter in the trustees of the Hickory High School. For these reasons we ask that this case be affirmed and we hope for a decision outlining the views of the court along this line.

STEVENS, J., delivered the opinion of the court.

The appeal in this case is from a decree overruling the demurrer of appellants to the bill of complaint exhibited against them by the town of Hickory, appellee herein. The suit is by the town of Hickory, a municipal corporation, by and through its mayor and board of aldermen, the material averments being that the town of Hickory, "through its aldermen and trustees of the Hickory high school," is the owner of certain schoolhouse property

described in the bill; that the defendants, Frank and L. M. Russell, "have gone over and took possession of said property, and have fenced and wired the same up;" that the town is entitled to an injunction restraining the defendants from going upon or trespassing upon the property; that a decree should be rendered "removing any clouds from the title of complainants to the aforesaid described land or the building thereupon situated so long as the said school is maintained and operated in Hickory for the benefit of the citizens of Hickory and the surrounding community." The bill avers that two acres of land were conveyed by one Frank Russell to the trustees of Hickory Institute and their successors in office in the year 1889; and while the bill does not specifically so aver, it appears from all the averments and admissions therein that the defendants claim title from the same source. This claim is based upon the alleged forfeiture of the following provision in the deed: "It is hereby agreed and understood that the above-described two acres of land are deeded to the trustees of Hickory Institute, and to their successors in office, for the purpose of maintaining and operating a school for the benefit of the community and surrounding country, and when abandoned for educational purposes then the said two acres of land revert back to the party of the first part."

The bill claims that the property in litigation has been used by the town as the Hickory high school, and is managed by trustees appointed by the mayor and board of aldermen. Upon the bill as filed a mandatory injunction was issued enjoining the defendants from going on or over, or trespassing upon, the premises in question, from interfering with or taking possession thereof, or exercising any ownership over the property whatsoever until the further orders of the court. The demurrer submits that the bill does not show any title or ownership in the complainant, the town of Hickory, and, secondly, that, taking all of the averments of the bill together, it



is shown that the property has ceased to be used for the purposes for which it was originally dedicated, and that the title has reverted. The second ground of demurrer seizes upon certain recitals in the bill stating that the town had purchased a new site for the Hickory high school and erected thereon a commodious and modern brick building, and had removed the teaching department to the new building. The only question to determine is the sufficiency of the bill.

In all suits to confirm title or to remove clouds it is the duty of the complainant to deraign title. This duty is expressly imposed by statute. In deraigning title, a general statement that the complainant is the real owner is insufficient. *Jackson v. Bank*, 85 Miss. 645, 38 So. 35.

The bill does exhibit the original deed from Frank Russell to the trustees of the Hickory Institute, executed in February, 1889, but no other conveyance is shown. At the time this conveyance was executed the municipality did not constitute a separate school district, and there is no showing that the trustees of Hickory Institute or their successors in office ever turned the property over to the municipality of Hickory to be used as a public free school or public high school in and for the municipality, or that the trustees of Hickory Institute ever made any conveyance to the town or any one else. There is no definite showing as to how or when the town of Hickory became interested in the subject-matter of this litigation. The property was originally conveyed "for the benefit of the community and surrounding country." The original conveyance then was not for the benefit of the town of Hickory alone, and the inference is that the Hickory Institute was being conducted as an educational institution, not only for the benefit of the inhabitants of the town, but also of the entire community. We are left in doubt as to whether the Hickory Institute was or was not incorporated. Subsequent to the execution and delivery of this deed section 4011, Code of 1892, was enact-

ed, authorizing a municipality to become a separate school district. Section 3343, Code of 1906, expressly authorizes municipalities "to erect, purchase or rent" schoolhouses, and it may be that this property has been deeded to the municipality for school purposes or turned over to the town to be operated for educational purposes. If so, the bill does not so aver.

Complaint is made in the assignment of errors of the action of the court in issuing a mandatory injunction to remove the defendants from the property and to prevent them from going upon or exercising in any manner control over it. The only decree appealed from, however, is the decree overruling the demurrer, and the propriety of the court's action in issuing an injunction is not necessarily presented for our decision. The record does not show a motion to dissolve this injunction on bill and demurrer, or any application whatever on the part of defendants seeking a dissolution. The argument is made on behalf of appellants that this is really not a bill to remove a cloud upon the alleged title of complainants, but a bill primarily for a mandatory injunction. It is contended that the bill shows upon its face that the defendants are in possession, and that a mandatory injunction to oust them of possession would be improper. It is further pointed out that the bill does not charge that the defendants are mutilating, destroying, or in any wise damaging the property, or that they are threatening to do so. The law is well settled that a defendant in possession under a *bona-fide* claim of title should not summarily be removed by mandatory process of the chancery court, especially where there is no averment that irreparable damage will be done the complainants. The bill does pray for an injunction, as indicated, but there is also a general prayer that the claim of defendants be canceled as a cloud upon the complainants' title.

For the reasons indicated, the decree of the learned chancellor will be reversed, the demurrer sustained, and

the cause remanded, with leave to the complainant to amend the bill generally within thirty days after receipt of the mandate by the clerk of the court below.

*Reversed and remanded.*

---

RAYBURN v. BANK OF COMMERCE.

[76 South. 826, Division A.]

**PARTNERSHIP. Corporations. Pleading organization. Report to secretary of state.**

Where in a suit by a bank on a note against the members of a firm, one of the defendants filed a special plea under oath denying that he was ever a member of the firm, and alleging that the note sued upon was in consideration of an indebtedness owing by a corporation of the same name as the alleged firm, organized under the laws of the state, this was sufficient though the plea did not state that the organization of the corporation was reported within thirty days to the secretary of state for even had such report been necessary when the corporation was organized, such defective organization was an affirmative matter which the bank should have set up by replication to the defendant's special plea.

APPEAL from the circuit court of George county.

HON. J. H. NEVILLE, Judge.

Suit by the Bank of Commerce against Oliver Rayburn and others trading under the name of the A. L. Hickman Company. From a judgment against the named defendant, he appeals.

The facts are fully stated in the opinion of the court.

*White & Ford*, for appellant.

It will be noticed that the declaration charges that appellant was a member of the co-partnership composing A. L. Hickman Company. The note was not attached to the declaration, and of course was not prop-

erly admissible, but that is a minor matter so far as this appeal is concerned. The note which appears in the record on page 21, is signed simply A. L. Hickman Company, and endorsed by A. L. Hickman; the appellant's name nowhere appears on the note.

The special plea of Oliver Rayburn denies that he was a partner in any such firm as A. L. Hickman Company, and as there is an agreement in the record, page 24, that no testimony was introduced, and the only evidence introduced was the note in question, there could have been no judgment rendered for plaintiff against the appellant, for this reason, but this plea says that appellant is not now and never has been a member of the firm of A. L. Hickman and Company, and further says that he did not execute the note sued on which is described as Exhibit "A" to plaintiff's said declaration, and that he is not now, and never was liable to plaintiff, or any one else for the said note, as a copartner with the said A. L. Hickman Company.

We do not deem it necessary, however, to go into this matter for we presume that counsel for appellee will admit that the only theory upon which appellant could be held liable as a "partner" in said corporation, is on account of an alleged failure to report the organization of the corporation within thirty days as required by section 930 of the Code of 1906, which is mentioned in the demurrer to appellant's special plea.

Now this plea, which was sworn to, was a perfectly good plea as against the demurrer, first for the reason that it was not necessary to set up the matter alleged in said plea about the organization of the corporation, Mr. Rayburn had denied that he was a member of any copartnership, and could have stopped there. But conceding, for the sake of argument, that it was necessary to go into detail about the organization of the corporation, if appellee wanted to show any failure to report the organization back, that was matter for a replication. However at the time this corporation was organized,

there was no law requiring the reporting back of the organization of corporations, and as the plea set out that his organization was had in 1905, the truth of which the demurrer admitted, and as section 930, Code 1906, never came into existence, or became a law in this state, until October 1, 1906. the plea was certainly not subject to this demurrer. So we say that as there was no law in existence requiring the organization of corporations to be reported back at the time this corporation was organized and until a year and a half afterwards, there is of course, no liability on the part of appellant as a partner. This sworn plea was not denied under oath. But the sustaining of the demurrer to this plea violated every principle of pleadings, for even if section 930, Code 1906, never came into existence, or became a law in this state, until October 1, 1906, the plea was certainly not subject to this demurrer, so we say that as there was no law in existence requiring the organization of corporations to be reported back at the time this corporation was organized and until a year and a half afterwards, there is, of course, no liability on the part of appellant as a partner. This sworn plea was not denied under oath, but the sustaining of the demurrer to this plea violated every principle of pleading, for even if section 930, Code 1906, had been the law at the time this corporation was organized the plea would have been good as against the demurrer for the reasons that the matters attempted to be taken advantage of by appellee in its demurrer, were matters which should have been pleaded in avoidance by appellee itself. There is no provision in our code that section 930 shall be retroactive, and even if there was such a provision, it would be unconstitutional for it would amount to an *ex post facto* law.

We see no reason for remanding the case as there is clearly no liability on the part of appellant and it appearing to this court that he could not be held liable as a partner for the reason that the law in question

was not in effect until long after the corporation was formed, and there being no contention that he is otherwise liable, we respectfully submit that the case should be reversed and judgment rendered here for appellant.

SYKES, J., delivered the opinion of the court.

The appellee, Bank of Commerce, filed suit in the circuit court of George county against A. L. Hickman Company, alleging in its declaration that this company was a copartnership composed of W. W. Broome, Oliver Rayburn, and A. L. Hickman. It further alleges that these partners were trading under the name of A. L. Hickman Company, and executed a certain note signed A. L. Hickman Company. The bank, as the owner of the note, instituted this suit. A plea of general issue was duly filed by the appellant, Oliver Rayburn. He also filed a special plea under oath denying that he was ever a member of the firm of A. L. Hickman & Co., and that he did not execute the note sued on, and that he was never liable upon the said note as a copartner of the other defendants; that the note sued on was in consideration of an indebtedness owing by A. L. Hickman Co., a corporation chartered and organized under the laws of the state of Mississippi, which charter of incorporation was duly approved by the Governor, recorded in the office of the secretary of state, and also recorded in the chancery clerk's office in Harrison county, the domicile of the corporation, before and at the time the note was executed; that the corporation was organized in 1905, and the indebtedness was incurred after its charter had been granted and filed, as above stated. A copy of the charter of the corporation was made an exhibit to this special plea. The appellee bank filed a demurrer to this plea, alleging: First, that it states defense; second, that it is insufficient in law; third, that it fails to show or allege that a report of the organiza-

tion of the corporation was made to the secretary of state within thirty days from the date of the purported organization. This demurrer was sustained in the lower court.

The only testimony introduced at the trial of the suit was the original note. Judgment was rendered against the appellant. Hence this appeal.

In the absence of any brief is this court on behalf of appellee, we can only surmise as to why a demurrer was sustained to the special plea. We think the plea sufficiently sets forth the details of the incorporation of this company. It is true that it does not state that its organization was reported within thirty days to the secretary of state. We think, however, the allegation of the plea sworn to that it was a corporation would be sufficient, even if it had been necessary at the time of its corporation to have reported this organization to the secretary of state. There is nothing in the plea to show a defective organization of the corporation; and if, as a matter of fact, it was defectively organized, this was an affirmative matter that should have been set up by replication by the bank.

Section 930, Code of 1906, which required a report of the organization to the secretary for state within thirty days, was, however, not in force when the corporation was organized and started business.

The demurrer to this special plea should have been overruled. The judgment of the lower court as to the appellant Oliver Rayburn is reversed, and the cause remanded.

*Reversed and remanded.*

VINSON ET AL., v. COLONIAL & UNITED STATES MORTGAGE  
Co. ET AL.

[76 South. 827, Division A.]

1. JUDGMENT. *Res judicata. Decree in partition.*

Where a decree in a former partition suit, following the pleadings and proof adjudicated the amounts paid for taxes by defendants therein, together with the improvements of the land all of which went to offset the claim of rents and profits due the plaintiff therein for use and occupation of the land for the years prior to that time which decree was affirmed on appeal by defendants, who gave a supersedeas bond conditioned to pay all damages and rents awarded by the supreme court on final hearing of the appeal. In such case the defendants therein are precluded from again claiming as an offset to the rents and profits the taxes paid by them on the land prior to the original decree, the matter being *res adjudicata*.

2. JUDGMENT. *Res judicata. Matters necessarily involved.*

In such case even though the taxes were not pleaded, proven, and adjudicated by the lower court as an offset to the rents and profits, they might and should have been, as being necessarily involved so that the claim is therefore *res judicata*.

APPEAL from the Chancery Court of Holmes county.  
HON. A. Y. WOODWARD, Chancellor.

Partition proceedings by Mrs. J. A. Vinson and others against the Colonial & United States Mortgage Company and others with counterclaim by defendants. From a decree for defendant, plaintiff appeals.

This case is now in the supreme court for the second time. The facts of the case necessary to an understanding of the points involved are fully stated in the opinion of the court in the former decision. See *Watson v. Vinson*, 108 Miss. 600, 67 So. 61. In that case the chancellor held that the appellants here owned a three-fourths undivided interest in the lands in controversy, and that appellee Mrs. Fannie M. Watson owned a one-fourth interest in said lands, and entered a decree accordingly on August 13, 1913, which was affirmed by the supreme court January 25, 1915, in the case



*supra*. When the appeal in the former case was taken to the supreme court, the appellees here, who were appellants in the other case, executed a *supersedeas* bond, which provided that they would "pay such costs, damages, and rents as shall be awarded by the supreme court of Mississippi on the final hearing of this appeal."

After the mandate of the supreme court was received by the lower court in May, 1915, appellants made demand of appellee Mrs. Watson for rents for the years 1913 and 1914, during which years she had remained in possession of said lands, claiming the same under the provisions of the will of her late husband, Dr. J. H. Watson, Sr., who was the father of appellants, and which rents she had collected during the time the former case was pending on appeal in the supreme court. afterwards, by supplemental petition appellants prayed that the rents for the year 1915 also be ascertained and awarded appellants.

The chancellor declined to allow the rents for these years, upon the theory that, in addition to paying taxes for those years, appellee Mrs. Fannie M. Watson had since the death of Dr. Watson paid all taxes upon said lands, and that from the death in 1884 of Mrs. Abbie T. Watson, the first wife of Dr. Watson and the mother of the appellants, up to the date of Dr. Watson's death, all taxes had been paid by Dr. Watson, whose sole devisee was appellee Mrs. Fannie M. Watson, and that therefore appellants' claim for rents was not as great as the equitable claim of Mrs. Fannie M. Watson against them for taxes during the period of years extending from the death of Mrs. Abbie T. Watson.

Appellants claimed, however, that all claim for taxes and improvements prior to the years 1913 had been adjudicated by decree of the chancellor in the former case, and that the claim for taxes for the years between the death of their mother and the death of their father had been offset by the rents to which appellants would have been entitled for said years, and that therefore any claim

1:6 Miss.]

Opinion of the court.

of appellee Mrs. Fannie M. Watson for taxes paid by her or Dr. Watson during the years prior to 1913 had been adjudicated.

*E. F. Noel and Boothe & Peeper*, for appellant.

*Elmore & Ruff and J. H. Watson*, for appellee.

HOLDEN, J., delivered the opinion of the court.

In the original partition suit filed by the instant appellants there was a decree of the chancery court favorable to them, and upon appeal to the supreme court the decree was affirmed. When the mandate of this court reached the lower court, the present proceeding now before us was started by the instant appellants for the purpose of enforcing payment of damages and rents due instant appellants which were secured by a certain *supersedeas* bond executed by the appellants in the first appeal. When this proceeding was begun in the lower court in accordance with the affirmance of the decree by the supreme court, the instant appellees, who were defendants in the original suit, filed a claim of offset against the appellants' claim for damages and rent, said offset being a claim for taxes paid on the land by Mrs. Watson, one of the appellees here now, for about twenty-eight years prior to the time that the original decree was obtained. Upon a hearing by the chancellor of the matters then and there presented by the proceedings and pleadings, the chancellor allowed the offset of the taxes paid for about twenty-eight years on the land by the instant appellees, which entirely offset and canceled the claim of the instant appellants for damages and rents accrued and due them for the use and occupation of the land by the instant appellees as provided in the *supersedeas* bond in the original appeal. From this decree the instant appellants appeal here, and urge that the amount paid out as taxes on the land for the years

preceding the date of the decree of the lower court in the original suit could not be pleaded as an offset to the damages and rents due the instant appellants and secured by the *supersedeas* bond of five thousand dollars herein, because the said claim of taxes paid was considered and allowed by the court in the original adjudication along with the improvements of the land as an offset against the claim of rents and profits which accrued to the instant appellants for the use and occupation of the land for the years previous to the decree of the lower court in the original suit.

It appears from the pleadings in the original suit, and proof offered by the parties, and also the decree of the chancellor in the original suit, that the amount claimed for taxes paid upon the land by the instant appellees was claimed and proved in the original suit, and was considered and adjudicated by the chancery court as part of the offset together with the improvements of the land, all of which went to offset the claim of rents and profits due the instant appellants for the use and occupation of the land for the years prior to that time. It is contended by the appellees in the present appeal that the amount of taxes paid out by appellees was not claimed nor allowed as an offset in the original suit, but that the proof with reference to the taxes paid out was made for the purpose only of establishing adverse possession of the land in appellees.

But the pleadings show the claim of taxes paid by instant appellees, and the tax receipts were introduced in evidence by the instant appellees, showing the amount of taxes paid out by them, also proof was made by instant appellees of the improvements made upon the lands. As against this the instant appellants claimed and proved the rents and profits due them by the instant appellees for the use and occupation of the land. The chancellor, having heard and considered all of this evidence, decreed, in effect, that the claims of the instant appellants for rents and profits for the use and occupa-

tion of the land for the previous years was offset by the improvements made and taxes paid on the lands for the previous years by the instant appellees. These matters having been set up in the pleadings, proved by the parties, they were duly considered and finally adjudicated by the chancellor, and therefore, when the present proceeding was started in the lower court after the mandate of this court had been filed below, the instant appellees were precluded from again claiming as an offset the taxes paid by them on the land for the years prior to the date of the original decree in the lower court.

But if there was any doubt as to the offset of taxes having been pleaded, proved, considered, and adjudicated by the lower court, we would still be of the opinion that the instant appellees could not plead the offset of taxes paid when the present proceeding was started in the lower court, for the reason that, if the offset for taxes was not pleaded and adjudicated, it might and should have been pleaded and proven by appellees, and adjudicated by the lower court at that trial, as it was necessarily involved, and the claim is therefore *res judicata*. This rule is well established. Section 3525, Code 1906; *Walker v. Williams*, 84 Miss. 392, 36 So. 450; *Gillum v. Case*, 71 Miss. 848, 16 So. 236; *Stewart v. Stebbins*, 30 Miss. 66; *Moody v. Harper*, 38 Miss. 599; *Davis v. Davis* 65 Miss. 498, 4 So. 554; *Hubbard v. Flint*, 58 Miss. 266; 15 R. C. L. 962.

There is another question in the case presented by this appeal, which is that the offset for taxes could not be successfully pleaded in the instant proceeding in the lower court because the offset was barred by the statute of limitations. But we deem it unnecessary to pass upon this question, as the decision of the questions above is sufficient to settle the controversy.

The decree of the lower court is reversed, and the case remanded.

*Reversed and remanded.*

## TOWN OF SUMNER ET AL. V. HENDERSON ET AL.

[76 South, 829, Division A.]

1. OFFICERS. *Trying title to office. Parties. Town.*

The town is not a proper party complainant to a suit by three claimants to oust three others from the office of aldermen and members of the board of school trustees.

2. QUO WARRANTO. *Trying title. Remedy. De facto officers.*

Where defendants were appointed by the Governor to the offices of alderman and members of the board of school trustees and were discharging the duties of such office, this constituted them *de facto* officers, and the only remedy of plaintiffs claiming title to the office was by *quo warranto*.

## 3. SAME.

An injunction will not be granted to prevent a party from exercising a public office pending proceedings to determine his right thereto.

APPEAL from the chancery court of Tallahatchie county.

HON. C. L. LOMAX, Special Chancellor.

Bill by the town of Sumner and others against R. A. Henderson and others. From a decree sustaining a demurrer to the bill, complainant appeals.

The facts are fully stated in the opinion of the court.

A. H. Stephens and R. H. & J. H. Thompson, for appellant.

The demurrer in this case specifies as to its grounds; First, that there is no equity in the bill. Surely a municipality has an equitable right by injunction to restrain persons from acting in any manner which is calculated to and which will inevitably bring confusion in the municipal affairs and to protect its citizens, and property-owners from danger of being subject to loss. See 2 Dillon on Municipal Corporations (5 Edition), par. 517, p. 840; see copy of par. at end of this brief.

The equity of the bill rests upon the fact that unauthorized persons without the semblance of right are assuming to act as officers of the town. If we be not mistaken the authorities will justify us in stating that this case presents one wherein there is unquestionably an equitable right in the municipality.

The second ground of demurrer asserts that the complainants have an adequate and complete remedy at law, but it is so manifestly not well taken that it needs no argument. What suit at law could the town of Sumner institute against the defendants? No lawyer can answer the question and point out a legal remedy, and if a legal remedy can't be pointed out the second ground of demurrer falls to the ground.

The third ground of the demurrer erroneously assumes the recital of several distinct facts, all of which go to show the way in which the defendants' unauthorized conduct will damage the municipality, to be the gist of the bill of complaint. The municipality is seeking but one and a sole remedy, although its right thereto may be established by separate and independent facts, each and every one of the facts showing the necessity for the single relief sought.

*Wells, May & Sanders, for appellee.*

It was conceded at the hearing before the chancellor, that the position of school trustee is an office, but even if it should not be so conceded here, the controversy has been set at rest by our court in the case of *Ellis v. Greaves*, 82 Miss. 36, the syllabus of the case reading as follows:

"A trusteeship of a public school is an office within the meaning of Code 1892, section 3520, providing a remedy by *quo warranto* against persons unlawfully holding office.

It thus appears that the questions relating to the administration of the school district are identical with the

questions relating to the administration of the municipality, and may be so treated.

The defendants, being acting officers, as alleged in the bill, and a remedy to test their right to hold these offices being provided and established, and this remedy being adequate and complete and to be administered in a court at law, has a court of chancery jurisdiction over this controversy.

The well settled rule, established by an unbroken chain of decisions, may be stated in substance as follows: "An injunction will not be granted to prevent a party from exercising a public office pending proceedings to determine his right thereto." *Moore v. Caldwell*, Freeman's Chancery Rep. 222; Pomeroy's Equity Jurisprudence, Vol. 5, pages 333, et seq.

In the case of *Adams v. Bank*, 75 Miss. 701, 23 So. 395, it is held that an officer *de facto* is one who exercises the powers and discharges the functions of an office, being then in possession of the same under color of authority, but without actual right thereto.

If it may be conceded that the three aldermen defendants and alderman Whitten are not rightfully entitled to hold the offices, they are certainly *de facto* officers, it being alleged in the bill that they are in possession of the offices, and being further alleged in the bill what are the functions of these offices. In view of these allegations if they are exercising the powers and discharging the duties, and in view of the general rule above stated, that an injunction will not lie at a suit of a municipal corporation, the claimant to an office, the state, an elector, a tax payer, or any other person, to test the right or title to an office, then the demurrer which forms the basis of the motion to dissolve the injunction is well taken.

Since the bill alleges, first, that the three aldermen defendants and alderman Whitten hold office under color of title by virtue of commissions held by them for these offices and since the bill alleges that the affairs of the

town are being conducted by them, and since the only ground upon which any relief is sought or could be asked, is to test the title to these offices, it seems obvious to us that the only recourse of the appellants herein, was to test the right or title to these offices by *quo warranto* Sec. 4017, et seq., Mississippi Code 1906; 29 Cyc. page 1416.

For a full, complete and comprehensive discussion of the entire subject, see monographic note. *Fletcher v. Tuttle*, 42 Am. St. Rep. 236, 237; *Hagner v. Heyverger*, 7 Watts & S. 104, 42 Am. Dec. 220; *Burke v. Leland*, 51 Minn. 355; *Cochran v. McCleary*, 22 Iowa, 75; *Markle v. Wright*, 13 Ind. 548; *Kilpatrick v. Smith*, 17 Va. 347; *Neiser v. Thomas*, 99 Mo. 224; *Neeland v. State*, 39 Kan. 154; *Guillette v. Poincy*, 41 La. Ann. 333; *Prince v. City of Boston*, 148 Mass. 285; *Neeland v. State*, 39 Kan. 154; *Detroit v. Board of Public Works*, 23 Mich. 546; *Board of County Commrs. v. Board of School Commrs.*, 77 Md. 283; *Neiser v. Thomas*, 99 Mo. 224; *Huels v. Hahn*, 75 Wis. 468; *Foster v. Moore*, 32 Kan. 483; *McDonald v. Rehner*, 22 Fla. 198; *Markle v. Wright*, 13 Ind. 548; *Burke v. Leland*, 51 Minn. 355; *Hagner v. Heyberger*, 7 Watts & S. 104, 42 Am. Dec. 220; *Jones v. Commissioners of Granville*, 77 N. C. 280; *Kerr v. Trego*, 47 Pa. St. 292; *Guillette v. Poincy*, 41 La. Ann. 333; *Remmelin v. Mosby*, 47 Ohio St. 570; *Armije v. Baca*, 3 N. Mex. 294; *State v. Mayor of Kearney*, 28 Neb. 103; *Remmelin v. Mosby*, 47 Ohio St. 570, *Colton v. Price*, 50 Ala. 424; *Stone v. Wetmore*, 42 Ga. 601; *Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237; *Sherman v. Clark*, 4 Nev. 138, 97 Am. Dec. 516."

For other authorities see Note 70, page 1416, 29 Cyc, including the case from our court, *Moore v. Caldwell*, Freeman's Chancery Rep. 222.

We deem it unnecessary to protract this discussion or to extend a vain parade of authorities holding all one way.



SYKES, J., delivered the opinion of the court.

The appellees, complainants in this case, filed a bill in the chancery court of the second district of Tallahatchie county against the defendants, asking that the defendants be enjoined from acting as aldermen and members of the board of school trustees. Without stating in detail the allegations of the bill, it is clear that the town of Sumner has two rival sets of claimants for the offices of alderman and members of the board of school trustees. The bill in this case, though claiming that the town of Sumner is a complainant, on its face shows that the mayor and two persons who claim to be aldermen have instituted this proceeding against three other acting aldermen who, with a fourth alderman not joined as either a complainant or a defendant, really comprise a majority of the acting board of mayor and aldermen. In other words the mayor and two claimants to the offices of alderman filed this bill individually, and in the name of the town of Sumner against an equal number of acting aldermen of the town. The bill further shows that these three defendants who are acting as aldermen, in connection with another alderman, constitute a majority of, to say the least, the *de facto* governing body of the municipality, and are administering its governmental affairs.

The bill further shows that the defendants, alleged members of the board of school trustees, are in charge of the school affairs, and are attempting to administer them. In short, the bill shows that the defendants in the case are exercising the duties of aldermen and members of the board of school trustees, respectively; that they are attempting to administer these duties by virtue of alleged illegal appointments to the offices by the Governor. The bill upon its face though signed by the town of Sumner shows that it is an attempt by three members of the board to oust three other members from office. That these three other members, in connection with the fourth mem-

ber not sued, constitute a majority of the board who are acting, as the complainants think, in violation of law. These facts being shown, we do not think the town of Sumner is a proper party complainant to the suit. This suit is an attempt by injunction to try the right and title to the offices of these defendants who are exercising the duties of these offices. The proper remedy is by *quo warranto*, not by injunction. This would be true, even though the town were a party complainant to the suit. The defendants in this case are in office, fulfilling the duties, and are, to say the least, *de facto* officers. This being true, the only remedy of complainants is by *quo warranto*. "An injunction will not be granted to prevent a party from exercising a public office pending proceedings to determine his right thereto." *Moore v. Caldwell*, Freem. Ch. 222. The rule is thus stated in Pomeroy's Eq. Jur. vol. 5, section 333: "It is a principle of universal application that an injunction will not issue when its object is to try title to public office."

Section 334, same authority: "For the same reason, an injunction will not issue at the suit of a member of the appointing body to restrain a person alleged to have been illegally appointed; nor at the suit of a taxpayer or elector; nor at the suit of a local body or municipal corporation."

The appointment of these defendants by the Governor, whether legal or illegal, and the performance by them of the duties constitute them *de facto* officers at least. *Adams v. Bank*, 75 Miss. 701, 23 So. 395.

The bill in this case also alleged fraud on the part of defendants. There was an answer denying fraud, and a demurrer was then filed to the rest of the bill, which was sustained by the lower court, from which decree this appeal is prosecuted. For the reasons above indicated, we think the court below was correct in sustaining the demurrer, and the decree of the lower court is affirmed.

*Affirmed.*

## BIBBY ET AL. v. BROOME ET AL.

[76 South. 835, Division A.]

1. WILLS. *Construction.*

A will reading "I give to J. P. R. (my adopted son) his natural life, my dwelling and all land I now possess except, etc., and upon his death to his children, if any, and if he should die without leaving any living children, or should die with children and they should die, thereupon or at their death, etc., to be equally divided between C. C. & S." gave an estate for life to J. P. R. with remainder in fee to his children, as provided by Code 1906, section 2764, and there being children, C. C. and S. would receive nothing, unless J. P. R. and his children should die before the testatrix; the rule being that, where the death of persons is dealt with as an uncertain event, it is presumed that not their death alone is meant, but at a particular time or under particular circumstances, and where it does not appear that such death was meant under particular circumstances, it will be presumed that the death should occur prior to the death of the devisee before the vesting in him of the property in possession, and to hold otherwise than that under this will the death should occur before the death of the testatrix would render the devise to C. C. and S. void for uncertainty.

2. PERPETUITIES. *Devise for more than two lives. Code 1906, Section 2765.*

Under Code 1906, section 2765, Hemmingway's Code, section 2269, providing that a conveyance or devise can be made in succession to two lives in being, then to the heirs of the body of the remainderman or right heirs of the donor, in fee simple, where the third in succession is not such an heir, the grant or devise is void, since such statute governs all grants and devises to a succession of donees in so far as the number, thereof and the class to which the last donee must belong is concerned and a grant or devise in violation of it is void.

3. PERPETUITIES. *Burden of proof. Code 1906, Section 2765.*

Under Code 1906, section 2765, Hemmingway's Code, section 2269, providing that a conveyance or devise can be made in succession to two lives in being then to the heirs of the remainderman or right heirs of the donor; the rule is that, unless and until the contrary appears the third donee will be presumed to be

116 Miss.]

Opinion of the court.

within one of the classes referred to in the statute. In other words, the burden of proving that such a donee is neither an heir of the body of the remainderman nor a right heir of the donor, is upon him who seeks to avoid the grant or devise for that reason.

APPEAL from the chancery court of Tallahatchie county.

HON. JOE MAY, Chancellor.

Bill to quiet title by Bessie C. Bibby and others against C. H. Broome and others. From an order sustaining a demurrer to the bill, plaintiffs appeal.

The facts are fully stated in the opinion of the court.

*McLean & Carothers* and *R. L. Cannon*, for appellant.

*J. C. Wilson* and *Tim E. Cooper*, for appellee.

SMITH, C. J., delivered the opinion of the court.

Appellants exhibited their bill in the court below, praying that appellees' claim to certain land be canceled as a cloud upon their title thereto. A demurrer to the bill filed by appellees was sustained and the bill dismissed. The facts, as they appear from the bill, are that Mrs. S. O. Rhew died in 1880, seised and possessed of the land in controversy, leaving a will by which she devised it as follows:

"I give to Jas. P. Rhew (my adopted son) his natural life, my dwelling and all the land I now possess, except that herein donated or given to Miss Sarah Lee, and upon his death to his children, if any, and if he should die without leaving any living children or should die with children and they should die, thereupon or at their death, the dwelling, the land and all the improvements and appurtenances thereto belonging to be equally divided between Jodie Calhoun, Bessie Calhoun, and Sue Lee Cossar"

—who, it is admitted by the bill, are heirs of neither Jas. P. Rhew nor of his children nor of the testatrix.

In April, 1881, Jas. P. Rhew died, leaving three children, Jas. W., Julian P., and Emmitt Rhew, surviving him; the two first named having been born during Mrs. S. O. Rhew's lifetime, and the last named having been born about six months after her death. In April, 1905, Julian P. Rhew conveyed his interest in the land to his brother Jas. W. Rhew, and appellees claim title by means conveyances from Jas. W. and Emmitt Rhew. Jas. W. Rhew died in 1908, but Julian P. and Emmitt Rhew are still living.

Appellants claim as ultimate limitees in the will of Mrs. Rhew a two-thirds interest in the land therein devised; that is to say, the interest therein of Jas. W. and Julian P. Rhew; but if mistaken as to the interest devised to Julian P. Rhew, who is still living, then that they are entitled to the one-third interest devised to Jas. W. Rhew, deceased. According to appellee's construction of the will, the devise is to Jas. P. Rhew for life, with remainder to his children in fee, with a limitation over to Jodie Calhoun, Bessie Calhoun, and Sue Lee Cossar, contingent upon either of two events: First, the death of Jas. P. Rhew without children surviving him, and, second, in event Jas. Rhew should die leaving children, then upon both his and his children's death during the life of the testatrix.

According to appellants' construction of the will, the devise is to Jas. P. Rhew for life and, in event he should die without children surviving him, to Jodie Calhoun, Bessie Calhoun, and Sue Lee Cossar in fee; but in event he should die leaving children, and both he and they should survive the testatrix, then upon his death to his children for life, and upon their death to Jodie Calhoun, Bessie Calhoun, and Sue Lee Cossar in fee.

Should appellants' construction of the will be accepted, two further questions are raised by appellees: (1) Does this limitation over to Jodie Calhoun, Bessie Calhoun, and Sue Lee Cossar violate the second clause of section 2269, Hemingway's Code (section 2765, Code

1906) which provides that, "any person may make a conveyance or a devise of lands to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainderman, and in default thereof, to the right heirs of the donor, in fee simple" and if not, then (2) Does this limitation over take effect as each of the children of Jas. P. Rhew shall die? or only upon the death of all of them?

By this will an estate for life to Jas. P. Rhew, with remainder in fee to his children, if any, is devised in clear and unmistakable language, as follows:

"I give to Jas. P. Rhew, my adopted son, his natural life, my dwelling and all the land I now possess, . . . and upon his death to his children, if any."

See section 2764, Code of 1906 (section 2268, Hemingway's Code).

The fee thus devised to Jas. P. Rhew's children may, of course, be cut down to a life estate by a subsequent provision of the will clearly expressing the testatrix's intention so to do. The language of the will which appellants claim has this effect is that immediately following the limitation over in event Jas. P. Rhew "should die without leaving any children," and is as follows: "And if he . . . should die with children and they should die, thereupon or at their death" to Jodie Calhoun, Bessie Calhoun, and Sue Lee Cossar. By this provision of the will the property devised is to go to the ultimate limites in event of the death of the children of Jas. P. Rhew at a time not clearly expressed in the will and which must be ascertained, if at all, by construction.

The death of the children of Jas. P. Rhew is here dealt with as an uncertain event, and, since it would be absurd to speak of death, the one event which is sure to occur to all persons, as uncertain and contingent, we must presume that the testatrix meant not their death alone but their death at a particular time or under particular circumstances, and the rule, under numerous author-

ities, is that where a devise is followed by a limitation over in case the devisee should die, and it does not appear that the testator meant death under particular circumstances, it is presumed that he meant the death of the devisee before the vesting in him of the property in possession. In other words, where the devise is to A., and in case of his death to B., the gift over to B. will take effect only in event of A.'s death before that of the testator's; but if the devise is to A. for life, with remainder to B., and in case of B.'s death to C., the gift over to C. will take effect in event B. dies at any time before the death of A., whether prior or subsequent to the death of the testator. *Sims v. Conger*, 39 Miss. 231, 77 Am. Dec. 671; *Nations v. Mortgage Co.*, 76 So. 642; *Edwards v. Edwards*, 15 Beav. 357; 20 Am. & Eng. Enc. of Law, 708; 3 Jarman on Wills (6th Ed.) 2144.

The will contains no words indicating that the testatrix intended the gift over to take effect on the death of these children under any particular circumstances, as for instance, their death without issue, so that of necessity, as well as under the rule hereinbefore referred to, we must presume that she meant their death at a particular time. She could have meant their death at any of three periods of time: First, at any time; second, prior to the death of their father, the life tenant; or, third, prior to the death of the testatrix. She clearly did not mean the first, for that was an event certain to happen, and she dealt with it as an event which might or might not occur. The second is excluded by the express language of the will. So we must presume that she meant their death during the only other period of time that can be conceived of in this connection, to wit, death during her own lifetime. In other words, by the language here used she was providing for the disposition to be made of her property in event neither Jas. P. Rhew nor his children survived her.

But if we should be mistaken in holding that the event here meant is death during the lifetime of the testatrix,

then the time at which the death of these children is to occur, in order for the limitations over to take effect, cannot be ascertained, and the limitation over is void for uncertainty; for it cannot in the very nature of things, become effective until the event upon which it is conditioned is shown to have occurred, from which it would follow that the prior devise to the children of Jas. P. Rhew would not be in any way affected thereby, so that, under either construction of the will, on the death of Jas. P. Rhew his children became the owners of the property not for life, but in fee simple absolute.

But, conceding for the sake of the argument that, as claimed by appellants, the devise is to Jas. P. Rhew for life, and on his death to his children for life, and on their death to Jodie Calhoun, Bessie Calhoun, and Sue Lee Cossar, the same result must follow; for they are neither heirs of the body of the remainderman, nor right heirs of the donor, consequently the limitation over to them violates the second clause of section 2765, Code of 1906 (Hemingway's Code, section 2269). Whether this clause of that section was intended as a substitute for, or as only an amendment to, the common law rules with which it deals is not here material, for in either case it must, of course, control wherever its provisions are applicable. Nor are we here concerned with the effect of the statute upon the time within which estates granted or devised to be enjoyed in the future must vest. The question here presented is simply this. Is this limitation over to Jodie Calhoun, Bessie Calhoun, and Sue Lee Cossar void for the reason that it is preceded by a succession of two donees, they—that is, Jodie Calhoun, Bessie Calhoun, and Sue Lee Cossar—being neither heirs of the body of the remainderman, nor right heirs of the donor? The statute on its face is plain, and becomes ambiguous, if at all, only when it is sought to restrict its operation to grants and devises of a specific character which it is sometimes claimed, as here, that its draftsman had only in mind. On its face, it plainly governs all grants and devises to a suc-



cession of donees in so far as the number thereof and the class to which the last donee must belong are concerned, and a grant or devise in violation of it is void. Under it a grant or devise may be made to a succession of three donees, the first two of whom must be living when the grant or devise is made, and the third must take in fee and be one or more of the heirs of the body of the remainderman, or one or more of the right heirs of the donor. *Cannon v. Barry*, 59 Miss. 289; *Banking Co. v. Field*, 84 Miss. 646, 37 So. 139. From which it clearly follows that, since Jodie Calhoun, Bessie Calhoun, and Sue Lee Cossar are not within either of the classes from which the statute provides that the third donee must come, the limitation over to them is void.

*Busby v. Rhodes*, 58 Miss. 237, is cited by counsel for appellants as holding that the third in a succession of three donees need not be one of the classes referred to in the statute; but that case cannot be so construed, for as appears from the original record, it was tried upon an agreed statement of facts, from which it does not appear what relation, if, any, the ultimate limitees bore to the remainderman or to the donor, the agreement being wholly silent in that respect, and the rule is, on which the court must be presumed to have then acted, that, unless and until the contrary appears, the third donee will be presumed to be within one of the classes referred to in the statute. In other words, the burden of proving that such a donee is neither an heir of the body of the remainderman nor a right heir of the donor is upon him who seeks to avoid the grant or devise for that reason.

The gift over to the Calhouns and Cossar being void even under appellants' construction of the will, it is not necessary for us to decide whether, if valid, it would have taken effect upon the death of each of the children of Jas. P. Rhew or only upon the death of all of them. Consequently, we express no opinion relative thereto.

*Affirmed.*

## ON SUGGESTION OF ERROR.

SMITH, C. J., delivered the opinion of the court.

All the matters brought to our attention by this suggestion of error were carefully considered when the cause was decided, and our opinion then expressed will be adhered to.

One argument pressed then and now, to which we did not then respond, is, that if appellants' construction of the will be correct (which, for the sake of the argument, we assumed in one branch of our original opinion to be the case), and the devise to appellants is held to violate our two-donee statute, a result which the legislature could not have intended will necessarily follow, which is, that a devise of a remainder to the third in a succession of donees will not be valid in event such third donee is not of the class to which, according to the statute, the last donee must belong, when such a devise, according to *Thomas v. Thomas*, 97 Miss. 714, will be valid if made in such manner as to be of an executory character. We are not here concerned with whether or not the announcement in *Thomas v. Thomas*, that our two-donee statute does not apply to executory devises, is correct, for the devise here is not of such character, but it will not be out of place to point out that the statement in the concurring opinion of Judge CALHOUN in *Bakking Co. v. Field*, 84 Miss., at page 667, that this statute was not intended to apply to executory devises, on the authority of which *Thomas v. Thomas* was decided, was neither concurred in by the other judges, nor called for by the case then before the court, for the instrument then being construed was not a will but a deed. Moreover, *Thomas v. Thomas* is in conflict with *Jordan v. Roach*, 32 Miss., at page 620, with *Hudson v. Gray*, 58 Miss. 882, and with *Henry v. Henderson*, 101 Miss. 751, 103 Miss. 48. In the first of these cases one of the grounds upon which the executory devise there under consideration was held void was that it violated this statute;

in the second, such a devise was held void solely for that reason; and in the last it was assumed that the statute applied and that the executory devise there under consideration would be void if in violation of it.

The devise in *Thomas v. Thomas* to the testatrix's grandchildren violated neither the statute nor the rule against perpetuities, so that the holding therein that the statute does not apply to executory devises was not necessary, for, as construed by the court, the devise was in trust for the benefit of the testatrix's two sons, R. L. and J. M. Thomas (the devise to F. G. Thomas having lapsed because of his death without issue during the testatrix's lifetime), and after their death to those of their children who should reach the age of twenty-one years, the children of each "to have their father's *pro rata* part," and in event all of the children of either of the testatrix's sons should die before reaching the age of twenty-one, that portion of the property which would have been their share to then go to the children of her other son who should reach that age; so that under no possible construction could the devise to the testatrix's two sons for life, assuming for the sake of the argument that they were donees within the meaning of the statute, have been held to be a succession of more than two donees, the ultimate limitees were within both of the statutory classes and the estate devised to them must have vested, under any possible state of facts, within twenty-one years and ten months after the death of the two first donees, both of whom were living at the testatrix's death, *Cannon v. Barry*, 59 Miss. 289. Moreover, this limitation over to the testatrix's grandchildren was not an executory devise but was a contingent remainder, *Festing v. Allen*, 12 Mees. & W. 279, 152 English Reports, Reprint, 1204; *Kales Cases on Future interests*, 108; *Alexander v. Alexander*, 16 C. B. 60, 139 English Reports, Reprint, 677.

*Overruled.*

WILLIAMS v. MAYOR AND BOARD OF ALDERMEN OF CITY OF  
VICKSBURG.

[76 South. 838, Division B.]

MUNICIPAL CORPORATIONS. *Charters. Amendments. Recording. Code*  
1906, *Section 3444.*

Under Code 1906, section 3444, providing that amendments to municipal charters when approved by the governor shall be recorded upon the records of the mayor and board of aldermen "and when so recorded, shall have the force and effect of law." When it appears that the amendment is not recorded, it will not have "the force and effect of law."

APPEAL from the chancery court of Warren county.

HON. E. N. THOMAS, Chancellor.

Bill by the Mayor and Board of Aldermen of the city of Vicksburg, against P. P. Williams to have a lien declared on lots for paving. From a decree for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*Brunini, Hirsch & Griffith*, for appellant.

The alleged amendment to the city charter was never, in fact, duly and legally made or adopted. The plea of appellant is to be found on page 12 of the Record. In the first subdivision thereof it is charged amendment to the charter of the city of Vicksburg, as set out in the original bill, was never in fact, duly and legally made or adopted, for the reason that the only recital on the minutes of the board is as follows:

"An ordinance to amend article 25 of section 28 of the city charter, and its amendments thereto, by giving the board of mayor and aldermen power to pave one or two city blocks, or squares, under certain circumstances without a petition of the property-owners abutting thereon, was read, and under a suspension of the rules was read the second and third time by its title, and

on its final passage was adopted by the following votes; Ayes; Mayor, Hayes; Aldermen, Hossley, Miller.

To be brief, the point raised in the plea is that the ordinance amending the charter, or rather the amendment itself, was not spread upon the minutes of the city council. The minutes quoted above contains all there is on the subject, and simply refers to the ordinance amending the charter, giving the substance of the amendment. We contend that the amendment itself should have been set out in the minutes of the board, because it is elementary that the board itself, in legislative matters can act, only through its minutes.

Section 13, of the city charter, found in the acts of 1884, reads as follows: "Section 13; be it further enacted, that the city clerk shall attend all of the meetings of the board of mayor and aldermen, and keep full and correct minutes of their proceedings in a well-bound book."

It is evident that a full and correct minute in reference to the alleged amendment was not kept by the clerk. "Where the law or charter requires the clerk to keep a journal of all the acts and proceedings of the city council, that, or a copy, is the proper evidence of the official doings of the body." *Lowell v. Wheelock*, 11 Cush. 391; *Morrison v. Lawrence*, 98 Mass. 219; *Louisville v. McKegney*, 7 Bush. (Ky.) 651.

"The only legal mode of proving facts on record is by the record itself, or by an attested copy of it." *Moor v. Newfield*, 4 Maine, 44.

"In the absence of required record evidence of the passage of an ordinance, it is not competent, except possibly under peculiar circumstances, to establish its adoption by extrinsic testimony." 5 Dillon. sec. 579.

Submission is therefore made by us that for the reason that the charter amendment was not fully set forth in the minutes of the board of mayor and aldermen, that there is insufficient evidence of the amendment as

alleged in the original bill, and that therefore, the effort to amend the city charter was in vain. .

*Anderson, Vollar & Kelly*, for appellee.

Appellant's contention is that this ordinance or amendment must have been spread in full *in haec verba* upon the minutes of the board, and because it does not so appear and was not so spread upon these minutes the ordinance or amendment is invalid and void, and of course all proceedings thereunder, including the one under consideration, were also void.

We earnestly submit that this is not the law, as has been repeatedly decided by the courts of the country. Not only did the minutes show that this ordinance was enacted and how it was enacted, but the facts further show that it was published according to section 3444 of the Code of 1906, providing how municipal charters may be amended, for three weeks in a newspaper published in Vicksburg, and was then submitted to the Governor, who in turn submitted it to the attorney-general, and was approved by the Governor and became thereby a valid amendment to the said article and section of the charter of the city of Vicksburg. The bill alleges that it was legally enacted and became a legal part of the city charter. The appellant denies this only upon the ground that the ordinance itself was not spread upon the minutes, but does not negative the idea that it was not spread upon the ordinance book or some other record of the said clerk's office. The allegation of the bill, therefore, that it was legal and legally done goes unchallenged.

Besides this all the presumptions are in favor of the legality of an ordinance unless it affirmatively appears that it is not legal, when a resolution to make an improvement is not required by charter or statute to be recorded, failure to do so will not invalidate the proceedings. An ordinance need not be spread in full upon the minutes or journal of a municipality; and more so,

we may add, that an act of the legislature is required to be spread in full upon the legislative journal. 28 Cyc., 1007.

It is not necessary that an ordinance and a contract and apportionments made thereunder, should be spread in full on the journals of a city legislature to make them valid." *Nevins v. Roche* (Ky.), 5 S. W. 546; *Bluefield v. Johnson* (W. Va.), 69 S. E. 848.

"Every presumption obtains in favor of the validity of an ordinance that there is in favor of the validity of an act of the legislature." *Duluth v. Krupp* (Minn.), 4 N. W. 235; *Downing v. Milondale* (Kan.), 14 Pac. 281; 28 Cyc., 343, et seq.; *Ross v. Wimberly*, 60 Miss 345.

The very authority cited by counsel on page 5 of their brief, being 2 Dillon (5 Ed.), sec. 570 is authority for this proposition as reference to that section will show. There can be, we submit, no doubt about the proposition that this amendment to the charter is legal and valid in all of its parts.

Cook, P. J., delivered the opinion of the court.

A bill of complaint was filed in the chancery court of Warren county by the city of Vicksburg to test the validity of an alleged amendment to the charter of the city, and to recover from P. P. Williams, the owner of certain lots located in said city, the sum of five hundred and forty-four dollars and thirteen cents, and, further, that the city be declared to have a first lien on the said lots of defendant, and that lien be declared by decree of the court.

The city of Vicksburg was working under a special charter obtained before the chapter on "Municipalities," Code of 1906, was adopted by the legislature.

The bill sets out the original charter provision whereby the city was authorized to pave the streets, upon the petition of a certain proportion of the lot owners, and to distribute the cost of the paving between the city and the lot-owners.

The bill then sets out the alleged amendment to the charter, which amendment authorizes the city to pave the streets upon its own motion when the lot-owners will not petition the city for the improvement in the way provided by the original charter.

The defendant, P. P. Williams, filed pleas whereby he alleged that the amendment to the city charter was never legally adopted. The pleas aver that the alleged amendment to the city charter was not set out *in haec verba* upon the minutes of the mayor and board of aldermen of the city of Vicksburg; that the only reference whatever to the determination of said board and said notice is in the minutes of complainant of the 20th of March, 1917, and is as follows, to wit:

“The following resolution offered by Alderman Hossley was unanimously adopted, to wit:

““Whereas, some of the owners of the property lying and abutting on that part of South street in the city of Vicksburg, beginning at and running west from Levee street, for one block or square, desire to have that part of said street paved in accordance with the provisions of article 25 of section 28 of the city charter, but a majority of the owners of a greater number of lots or parts of lots or the owners of a greater number of lineal feet fronting on said block, although requested, will not petition for the same to be so paved; and

““Whereas, the mayor and aldermen of the city of Vicksburg deem it necessary, and do now so adjudge that it is necessary, for said block or square of said South street, beginning at and running from Levee street, back west for one block or square, to be paved or turnpiked or graveled, according to said charter provision:

““Now, therefore, be it resolved by the mayor and aldermen of the city of Vicksburg, by virtue of the power and authority vested in them by the amendment of said article 25, approved by the Governor of the state of Mississippi on July 7, 1914, said block of said South street running from Levee street back west be, and the



same is hereby, ordered to be so paved, turnpiked, or graveled as aforesaid, the same to be done under and in accordance with the provisions of said article 25 and its amendments, including the said amendment of July 7, 1914, aforesaid.'

"On motion of Alderman Hossley, the mayor was requested to advertise for bids for paving one block on South street running west from Levee street, also the paving of one block on Adams street between Jackson and Grove streets, the bids to be opened at the regular meeting to be held on April 2, 1917."

To the pleas of defendant the city interposed a demurrer, and the court sustained same. Whereupon defendant filed a demurrer to the bill of complaint upon the following grounds, to wit:

"(1) That there is no equity on the face of said bill.

"(2) That said amendment under which defendant is sought to be charged with the cost of said pavement is null and void.

"(3) That complainant had no power or right under said amendment to pave said street.

"(4) That complainant had no power or right to require it to pay one-third of the cost of said pavement, as it did not petition for said pavement.

"(5) That the complainant had no power or right to pave said street, or to require defendant to pay one-third of the cost thereof, as no petition of the abutting property owners was presented to pave said street.

"(6) That complainant has no lien under article 23, section 28, on defendant's said property, for the payment of one-third of the paving price charged to it."

This demurrer was overruled. The defendant appeals to this court.

Passing over the form of pleading adopted in this case, we will consider the case upon its merits. It will be observed that the court held that the pleas of defend-

ant were insufficient in law and offered no defense to the case made by the bill of complaint. As we interpret the pleas, they allege facts which, if true, were a complete bar to the action filed by the city.

Section 3444 of the Code, referring to amendments to municipal charters, expressly provides that amendments to municipal charters when approved by the Governor shall be recorded upon the records of the mayor and board of aldermen, "and when so recorded, shall have the force and effect of law," and we think it may be said, when it appears that the amendment is not recorded, it will not have "the force and effect of law."

*Reversed and remanded.*

## BUTLER v. EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN.

[76 South. 839, Division A.]

### 1. WORDS AND PHRASES. *Leg.*

The common definition of "leg" does not include the foot nor any of the bones of the foot.

### 2. INSURANCE. *Mutual benefit insurance. Reasonable changes in by-laws.*

Where an insurance contract in a mutual benefit society provides that the insurance is granted by the society to the member with the distinct provision that the rights and benefits shall be subject to and be governed by the Constitution and by-laws of the fraternal society existing when the policy was issued or that may thereafter be adopted or amended by the society before the injury occurred, such a provision permits any reasonable change in the rights and benefits under the covenant by amendment or adoption of laws of the society which might increase or decrease the dues and assessments, or define an ambiguous term in the covenant, or reasonably reduce the benefits, and such change in the laws of the society is valid, if reasonable and is to be read into the contract as if written therein.

### 2. INSURANCE. *Mutual benefit insurance. Amendment of constitution. Reasonableness.*

Where at the issuance of a policy by a mutual benefit insurance society, the covenant or contract of insurance and the Constitu-

tion and by-laws of the society provided that the beneficiary should receive two hundred dollars in the event of a broken leg, and thereafter such provisions of the Constitution of the society was amended to provide that the beneficiary should be paid one hundred dollars in the event of a complete fracture of the thigh, involving either the upper or lower extremity, or the shaft of the bone, or in the event of complete fracture of either or both bones of the lower leg (*tibia*, or shin bone, or *fibula*), at either extremity or along the center or in event of the complete fracture of the knee cap, such amendment to the Constitution, defining what was meant by a broken leg, was reasonable and proper under the provision of the insurance contract, that the member's rights and benefit were subject to and governed by the Constitution and by-laws of the society as existing or amended.

APPEAL from the circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Suit by Young D. Butler against the Eminent Household of Columbian Woodmen. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*Watkins & Watkins*, for appellant.

Contracts of insurance shall be liberally construed in favor of the insured and against the insurer; and where a policy is susceptible of ambiguous construction that construction should be placed upon it which shall preserve the rights of the insured and prevent a forfeiture.

The rule just stated is of such universal character and so well recognized by the courts of this state, as well as the other states of the Union, that its further elucidation here is needless. However, we will briefly refer to a few leading cases most closely touching the point involved in the case at bar: *Healey v. Mut. Acc'd. Ass't, of the N. W.* 23 Am. St. Rep. 637; *Miss. Mut. Ins. v. Ingraham*, 34 Miss. 215; *Liverpool, etc., Ins. Co. v. Van Os*, 63 Miss. 431; *Shivers v. Farmers' Mut. Fire Ins. Co.*, 55 So. 965; *Turner v. Fidelity & Cas. Co. of N. Y.*, 67 Am. St. Rep. 428; *Lowenstein v. Fidelity & Cas. Co.*, 88 Fed. 474; *Cross v. Shatliffe*, 1 Am. Dec. 645; *Bradley*

v. *Nashville Ins. Co.*, 48 Am. Dec. 465; *Rankin v. Amazon Ins. Co.*, 23 Am. St. Rep. 460; *Renshaw v. Mo. State, etc., Co.*, 23, Am. St. Rep. 17.

Where a mutual benefit society executes a beneficiary covenant in consideration, partly, of compliance on the part of the insured with the constitution and by-laws of such society then existing or as thereafter legally amended, only such amendments can be validly passed and adopted as are reasonable, do not impair the vested rights of a member, reduce the benefits or amounts payable thereunder, nor radically alter the original contract of insurance. 70 So. 241; *Sophia Murphy v. Independent Order of the Sons and Daughters of Jacob of America*, 77 Miss. 830.

A case limiting the right to amend by-laws so as to affect the pre-existing rights of old members is found in the case of *Supreme Lodge Knights of Pythias v. Josephine R. Withers*, 177 U. S. 260; *John G. Bragaw v. Supreme Lodge Knights and Ladies of Honor*, handed down by the supreme court of North Carolina, 128 N. C. 354, 54 L. R. A. 602; *Strauss v. Mutual Reserve Fund Life Assn.*, 126 N. C. 971, 54 L. R. A. 605, 36 S. E. 352; *Supreme Lodge K. of P. v. Withers*, 177 U. S. 260, 44 Law. Ed. 762; 20 Sup. Ct. Rep. 611, filed April 9, 1900; *J. W. Gaunt and wife v. Supreme Council American Legion of Honor et al.* being from the supreme court of Tennessee, 55 L. R. A. 465; *Knights Templars & M. Life Indemity Company v. Jarman*, 44 C. C. A. 93, 104 Fed. 638; *Beach v. Supreme Tent of Knights of Macca-bees of the World*, 69 N. E. 281; *Parish et al. v. N. Y. Produce Exchange*, 61 N. E. 977; *Cov. Mut. Life Ass't. of Ill. v. Kentner*, 58 N. E. 966; *Newhall v. Supreme Council Legion of Honor*, 63 N. E. 1; *McAlarney v. Supreme Council A. L. H.*, 131 Fed. 538; *Lipincott v. Supreme Council A. L. H.*, 130 Fed. 483; *Starling v. Supreme Council*, 108 Mich. 440, 62 Am. St. Rep. 709; *Supreme Council of American Legion of Honor v. Getz*, 112 Fed. 119; *Russ v. Supreme Council American Legion of Honor*, 111 La. 588, 34 So. 697, 98 Am. St. Rep. 469;

*Wuerlfer v. Trustees of Grand Grove of Wisconsin of the Order of Druids*, 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940.

Much stress was laid on the case of *Jacobina Dornes v. Supreme Lodge K. of P.* 77 Miss. 466, in the lower court, but only a cursory examination of said case is necessary to show beyond any doubt that such case is in no wise similar to the case at bar.

In reference to the general right to amend, we call the attention of your honors to the following decisions, all of which are in absolute accord with the views here insisted on. *Union Mut. Acc. Ass'n. v. Frohard*, 25 N. E. 642; *Knights T. & M. Life Indem. Co. v. Vail*, 68 N. E. 1103; *Knights of Honor v. Bieler*, 105 N. E. 244; *Wist v. Grand Lodge Ancient Order of United Workmen*, 22 Ore. 271, 29 Am. St. Rep. 603.

The subsequently enacted amendment being void and of no effect as to the rights of appellant herein under his original certificate or beneficiary covenant, then the section under which his policy is to be construed is section 8 of the original constitution and by-laws.

Said section 8 provides as follows, to wit: "Should the holder of a beneficiary covenant suffer a broken leg or arm he shall be paid two hundred dollars," and we submit that such provision covers the injury of appellant herein.

Following the line of the preceding argument it naturally and logically follows that the subsequently enacted by-law and amendment being void, that the by-law to be used in the construction of the terms of this certificate is therefore contained in the original constitution and by-laws, above referred to.

Then the question presents itself does the clause "suffer a broken leg," cover a fracture of the two bones called oscalsis and astragulas of the left lower limb, being the two bones just below the ankle joint, and joining the ankle with the bones below (Agreed Statement of Facts, Trs. p. 8, beginning with line 14). In answer to that question we submit the following cases: *Rogers v.*

*Modern Brotherhood of America*, 131 Mo. A. 353, 111 S. W. 518; *Malcolm Peterson v. Modern Brotherhood of America*, 67 L. R. A. 631.

Appellant respectfully submits that the finding of the learned trial court should be reversed, and decree and judgment with costs, awarded to the appellant here.

*J. A. Teat*, for appellee.

The examination of the authorities relied upon by the appellant shows that counsel have gone into those states of this union which have adopted a wholly different rule from the one followed by the supreme court of Mississippi. Mr Bacon, in his remarkable work on *Life & Accident Insurance*, 4th Edition, Vol. 1, sec. 234, and pages following, has set an alphabetical list of the states following the rule that members are bound by subsequent amendments to the by-laws, placing Mississippi in this list and citing the very recent case of *Neuman v. Supreme Lodge, Knights of Pythias*, 110 Miss. 371, 70 So. 241; L. R. A. 1916, ch. 105.

We have examined with considerable care the cases cited by counsel for appellant and find that they almost uniformly follow the rule which Judge CAMPBELL in the *Neuman* case referred to when he said:

"If it be understood that the rule announced in the cases cited by appellant's counsel condemns the amendment in question, even when applied to the facts as they are in this case, then we unhesitatingly disapprove of that rule." 110 Miss. 383.

From a full examination of the cases from the various states, we find that there is some authority for the contention that the total amount to be recovered upon death, based upon a life insurance contract, cannot be changed by by-law on the apparent ground that the beneficiary therein named, of necessity being some other person than the insured, has a vested right in the amount of recovery as mentioned in the policy. But we fail to find any authority holding that an amendment to reduce the recovery to be had in favor of the insured upon the happening of a mere accident, on the ground of it interfering

with a vested right, has ever been held to be void and unenforcible. *Ankele v. Workingmen's Relief Societies, A. U. V. O. of Illinois*, 182 Ill. App. 470.

A broken leg should be considered and certainly is very different from a broken foot. It is true that the foot is a part of the leg just as the leg is a part of the body but certainly there is no good reason to say that the foot is the leg, and certainly there is no good reason for this court to say that the Columbian Woodmen cannot by its by-laws, say that the foot is not a part of the leg. *Ross v. Modern Brotherhood of America*, 95 N. W. 207, 120 Iowa, 692.

We shall not attempt here to give anything like a full list of the well-known accident and casualty companies, benevolent and otherwise, which have formally adopted the definition as given in the by-law now in question, but a casual observation from the reported cases, show the following as well as many others, who have adopted this definition; and we have been unable to find it repudiated or to be declared void and unenforcible by a single court in the country: Fidelity Mutual Life Ins. Company, Royal Casualty & Life Ins.; General Accident & Life Insurance Company; Casualty Co. of New York; Aetna Life Accident Ins. Company and many others too numerous to mention.

So thoroughly are we convinced of the correctness of the decision in the case of *Ross v. Modern Brotherhood*, 95 N. W. 207, 120 Iowa, 692, that we have concluded to stake this case on it.

"It is contended that the new by-law is not retroactive. This may be conceded, and, if we were asked to apply it to a case of injury before its enactment, we are inclined to think the contention sound; but the by-law clearly says what shall be deemed a broken leg after its enactment, and as the plaintiff's injury was in fact received thereafter, and when it was in force, it is clear that it was intended to and does apply to this case.

We respectfully submit that this cause should be affirmed.

HOLDEN, J., delivered the opinion of the court.

The appellant, Young D. Butler, sued the appellee in the circuit court of Hinds county to recover on a policy or beneficiary covenant of insurance for an alleged broken leg and from a judgment in favor of the appellee benevolent society the appellant brings this appeal here.

The agreed statement of facts is here set out:

"It is agreed by and between the parties, plaintiff and defendant, to the above-styled suit, that the same be tried before the judge, a jury being waived, on the following agreed statement of facts, to wit:

"First. That for a valuable consideration, and for value received, upon the written application of the plaintiff there was issued to the plaintiff by the defendant, on the 7th day of December, A. D. 1905, a contract or policy of insurance, called a beneficiary covenant. A copy of said application, accepted by the defendant on or before the 7th day of December, A. D. 1905, is hereto attached as Exhibit A, and is a part here-of the same as if fully copied herein. A copy of said contract or policy of insurance, called a beneficiary covenant accepted by the plaintiff on the 7th day of December, A. D. 1905, is hereto attached as Exhibit B, and is a part here-of the same as if fully copied herein.

"Second. That the plaintiff from the issuance of said contract or policy of insurance, called a beneficiary covenant, has made all payments and performed all things required of him, to keep said contract or policy of insurance, called a beneficiary covenant, in full force and effect, and the said contract or policy of insurance, called a beneficiary covenant, has been in full force and effect, and said plaintiff, as called in said policy or covenant, a worthy guest of the defendant order, in good standing, from the issuance of said policy or covenant, until now, and said policy or covenant was in full force and effect, and plaintiff said worthy guest in good standing, on the 25th day of November, A. D. 1915.



“Third. That at 1 o'clock a. m. on the said 25th day of November, A. D. 1915, while said policy or covenant was in full force and effect, and plaintiff said worthy guest in good standing, plaintiff was also a guest of the Rainey Hotel in the town of New Albany, Miss., which had caught on fire, and from which plaintiff, at said hour, only escaped with his life from a death by fire by means of an improvised rope of bed clothing let down by him from the window of the room occupied by him on the third floor of the said hotel, but which rope lacked twenty (20) feet of reaching the ground, and from the end of which plaintiff fell to the ground, thereby accidentally breaking the two bones called *os calcis* and *astragalus*, of his left lower limb, being the two bones just below the ankle joint, and joining the ankle with the bones below, from which plaintiff was laid up for many weeks with the injured part in a plaster of paris splint.

“Fourth. That there is attached hereto as Exhibit C and made a part hereof the same as if fully copied herein, a copy of the constitution and by-laws of the defendant order in force and effect at the time of the issuance of this policy or covenant, and still in force and effect so far as this suit is concerned, unless superseded by the new constitution and by-laws promulgated by the defendant order in December, 1913, and the amendments thereto, promulgated by the defendant order in December, 1914.

“Fifth. That there is attached hereto as Exhibit D, and made a part hereof, the same as if fully copied herein, a copy of said constitution and by-laws promulgated by defendant order as aforesaid in December, 1913, and the amendments thereto, promulgated by defendant order as aforesaid in December, 1914.

“Sixth. That plaintiff consented to no change either in the constitution or the by-laws of the defendant order affecting his rights and benefits as expressed in the said policy or covenant, unless by the terms and provisions

of said policy or covenant itself, by reason of his acceptance of said policy or covenant.

“Seventh. That if plaintiff’s policy or covenant aforesaid covers the aforesaid injury then satisfactory and due proof thereof was made to the defendant order by plaintiff.

“Eight. That plaintiff has never been paid anything by the defendant order by reason of or on account of said injury, but the defendant order has refused to pay plaintiff anything by reason of said injury, denying liability to plaintiff in the premises.”

The policy sued upon was issued to the appellant in 1905, and contains the usual clause in such fraternal insurance policies, “executed in consideration of the warranties made in the application of this guest and of compliance on the part of this guest with the constitution and by-laws of this fraternity, now existing, or as hereafter legally amended all of which and the application of this guest are a part of this covenant.” The application for the insurance made by the appellant contained the same provision; that is, that the insured should be bound not only by the constitution and by-laws of the society as it existed at the date of the execution of the insurance covenant, but should be bound by the constitution and by-laws of the society which should thereafter be legally amended.

At the date of the issuance of the beneficiary covenant herein, in 1905, the covenant or contract of insurance and the constitution and by-laws provided that the beneficiary should receive two hundred dollars in the event of broken arm or broken leg. Subsequently, in the month of December, 1914, the above provision of the constitution of the society was amended to read as follows:

“Should the holder of a beneficiary covenant in good standing suffer the complete fracture of the arm at either extremity, or the shaft, or in the event of the complete fracture of one or both bones of the forearm, either at the

extremities or the shaft, or in the event of the complete fracture of the thigh, involving either the upper or lower extremity, or the shaft of the bone, or in case of the complete fracture of either or both bones of the lower leg (*tibia*, or shin bone or *fibula*), at either extremity or along the center, or in the event of the complete fracture of the kneecap, there shall be paid one hundred dollars."

It will be observed that the appellant beneficiary was injured in November, 1915, and that the injury was the fracture of two small bones of his foot, the *os calcis* and *astragalus*, the two bones just below the ankle joint for which injury this suit is brought. It also appears that he had continued to pay the premiums or dues on the policy without protest after the amendment to the constitution and by-laws was made by the society in December, 1914.

The appellant bases his claim here on the ground that the two small bones in his foot which were broken constitutes "a broken leg." and is covered by the policy and laws of the society in force in 1905, under the provision, "in the event of broken arm or broken leg," in the policy, and that the amendment or change in the by-laws and constitution made by the society in 1914 is illegal and void, and not binding upon him, and that the claim is valid under the covenant and laws of the society existing at the time the policy was issued.

It is unnecessary to consider and discuss but one question presented by this record in order to reach a decision of the controversy, and that is, whether or not the change or amendment to the constitution and by-laws of the appellee fraternal society made in December, 1914, which changed the provision of benefit "in the event of broken leg" to the provision of benefit "in the event of the complete fracture of the thigh or of either bones of the lower leg (*tibia*, or shin bone, or *fibula*), or in the event of the complete fracture of the kneecap," was reasonable. In other words, under the terms of the policy and the constitution and by-laws of the society in

1905, when the policy was issued, the beneficiary could recover in the event of a "broken leg," which provision the appellant contends here would include any bone from the thigh down to and including the toes of the foot. The amendment to the by-laws and constitution of the society made in 1914 expressly defines what is meant, and specifically names the bones of the leg, the fracture of which entitles the insured to the benefit, and states what is included in the insurance risk, and that is, in effect, that the meaning of "broken leg" is the fracture of one of the bones of the lower leg or *tibia*, or the kneecap, or the thigh, but does not include the bones of the feet.

The appellant urges, and cites some authority holding, that the leg means any of the bones from the thigh down to the toes, but it appears from other authority and the common definition of "leg," that it does not include the foot nor any of the bones of the foot. However, if the bones of the foot should be included in the meaning of the word "leg," still we do not think that the fracture here of the two small bones of the foot comes within the beneficial terms of the policy, for the plain reason that the provision of the constitution and by-laws of the society, as changed and amended in December, 1914, expressly and definitely defines and names what bones of the body shall be considered the leg, and plainly provides for what fractures of the bones of the leg the beneficiary may recover. It is argued in the brief of the appellant that this amendment of the constitution and by-laws of the society is void and not binding upon the appellant because the amendment is unreasonable and impairs or destroys a vested right of the appellant under the contract of insurance.

This character of insurance contract in a mutual benefit society which provides that the insurance is granted by the society to the member with the distinct provision that the rights and benefits shall be subject to and be governed by the constitution and by-laws of this fraternal society existing when the policy issued or that may there-

after be adopted or amended by the society before the injury occurs, certainly permits any reasonable change in the rights and benefits under the covenant by amendment or adoption of laws of the society which might increase or decrease the dues and assessments, or define an ambiguous term in the covenant, or reasonably reduce the benefits, and such change in the laws of the society is valid, if reasonable, and is to be read into the contract as if written therein.

We are called upon here to pass upon the question of whether the amendment or change in this case made in the constitution and by-laws of the society in December, 1914, impaired a vested right or was void on account of being unreasonable. We do not think the change or amendment of the laws of the society made in December, 1914, was unreasonable, but on the contrary the change was reasonable, and probably wise and necessary, and was fully authorized by the laws of the society and the covenant of insurance, which expressly govern and determine the measure of the rights of the appellant under the beneficiary policy issued in this case. This rule of law is sustained by the best authority on the subject. *Ross v. Modern Brotherhood of America*, 120 Iowa, 692, 95 N. W. 207, and the authorities there cited; *Newman v. Supreme Lodge K. of P.*, 110 Miss. 371, 70 So. 241, L. R. A. 1916C, 1051; *Supreme Lodge K. of P. v. Mims*, 241 U. S. 574, 36 Sup. Ct. 702, 60 L. Ed. 1179, L. R. A. 1916F, 919; *Sovereign Camp W. W. v. Woodruff*, 80 Miss. 546, 32 So. 4; *Supreme Commandry v. Ainsworth*, 71 Ala. 449, 46 Am. Rep. 332; *Gilmore v. Knights of Columbus*, 77 Conn. 58, 58 Atl. 223, 107 Am. St. Rep. 17, 1 Ann. Cas. 715; *Fullenwider v. Supreme Council. etc.*, 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239; *Norton v. Catholic Order etc.*, 138 Iowa, 464, 114 N. W. 893, 24 L. R. A. (N. S.) 1030; *Kirk v. Fraternal Aid Ass'n*, 95 Kan. 707, 140 Pac. 400; *Ury v. Modern Woodmen of America*, 149 Iowa, 706, 127 N. W. 665; *Uhl v. Life & Annuity Ass'n*, 97 Kan. 422, 155 Pac. 926; *Wright v. Minn. Mut. Life Co.*, 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832. The authorities cited in

these cases thoroughly discuss the question here involved, and sustain our holding above. Now, we conceded above for the purpose of the discussion that the change in the laws of the society was a material change in the benefits of the policy because it excluded any benefit for injury to bones in the foot, and that recovery might have been had for such injuries to bones in the foot before the change in the laws of the society was made in 1914, and we holding that such change was reasonable and valid and binding upon the appellant beneficiary herein. But as a matter of fact we are unable to say that the amendment of the laws of the society in December, 1914, really changed the benefits of the policy, or that it did not merely define what was meant by the original provision of "broken leg" of 1905. That is, the change made in the laws of the society in 1914 seems to have simply declared in unambiguous terms what was and is, meant by the word "leg" in the policy, and that the fracture of the leg did not and does not mean the fracture of a small bone in the foot, which fracture is the basis of this suit. *Ross v. Modern Brotherhood of America, supra*. Defining what an ambiguous provision in the insurance policy means, may not necessarily result in changing or reducing or eliminating a material benefit therein. We do not say here that it was even necessary that the meaning of "leg" should have been expressly defined by the laws of the society, because it may be that the "leg" does not include the foot, toes, nor any of the bones of the foot, and if that be true, the appellant here could in no event have recovered under the contract of insurance in this case, because at no time did his covenant of insurance specifically provide a benefit for the fracture of any bone in his foot, consequently such fracture must have been of one of the bones of the leg in order that he should receive the benefit named in the insurance policy. But we do not pass upon this question.

It follows from the above conclusions that the appellant was deprived of no vested right under the insurance

policy on account of the change or amendment in the constitution and by-laws of the society made in December, 1904. *Ross v. Modern Brotherhood of America, supra*. We think the principle involved in the case before us is the same as that in the *Newman v. Supreme Lodge K. of P., supra*, and the able opinion of Special Justice CAMPBELL in that case is good authority, and splendidly covers the field on the particular subject.

It will be borne in mind in the instant case that the appellant was a member of the appellee mutual insurance society, and as such may have participated, directly or indirectly, in changing or amending its constitution and by-laws, and may have been charged under its laws with knowledge of amendments and changes made which affected his covenant of insurance; and it appearing that he continued to pay his premiums or dues in the society for the insurance furnished him after the constitution and laws of the society had been changed in December, 1914, he may have expressly or impliedly ratified the change made in the policy about which he now complains. But we do not pass upon these questions now because it is unnecessary to do so in view of the conclusion reached above.

The judgment of the lower court is affirmed.

*Affirmed.*

## ILLINOIS CENT. R. CO. v. ROGERS &amp; HURDLE.

[76 South. 686, Division A.]

1. CARRIERS. *Shipments of live stock. Notice of loss.*

Where under a contract for shipment of live stock, there was a provision requiring notice of claim for damages within one day after delivery at destination, as a condition precedent to a right of recovery, such provision was sufficiently complied with, where before accepting the shipment of stock at destination, the shippers required the agent of the terminal carrier to note on the freight bill that "shipper received stock under condition stock in bad shape account overrun and lack feed and water."

2. CARRIER. *Damages to stock. Time for bringing suit. Waiver.*

Where in the correspondence between the shipper and the carrier in reference to a claim for damages to a stock shipment, there was no reference to the six months' limitation for bringing suit contained in the bill of lading, or extension of time granted or requested, in such case there was no waiver of such limitation by the correspondence.

3. COMMERCE. *Interstate commerce. Shipment between points in state.*

Where a bill of lading shows the routing to be outside of the state, though the points of origin and destination both be within the same state, under the decision of the United States supreme court, it is an interstate shipment, governed by the Carmack Amendment (Act June 29, 1906, ch. 3591, sec. 7, Pars. 11, 12, 34 Stat. 595; U. S. Comp. St. 1916, secs. 8604 A-8604AA.).

4. CARRIERS. *Carmack amendment. Applicability.*

The Carmack Amendment applies although suit is not against the initial carrier, based on the bill of lading, but against the connecting carrier.

5. CARRIERS. *Bills of lading. Shortening time for suit.*

The provision in a bill of lading on an interstate shipment of mules, requiring suit to be brought for damages within six months, was valid and binding and under the evidence in this case was not waived by the carrier.



6. EVIDENCE. *Admission. Stipulations as to liability of shippers.*

The signing by shippers of a bill of lading stating that they have had the option of shipping at carriers' risk at a higher rate, but have elected to make a contract stipulating that suit must be brought within six months and accept the lower rate, is an admission that they were offered by the initial carrier, two separate contracts, and that they chose the one containing the stipulation in consideration of the reduced rate.

7. CARRIERS. *Stipulations as to liability. Burden of proof.*

In such case, before the shippers can avoid the stipulations in the contract the burden of proof is upon them to show that they were not offered the choice of rates referred to in such contract, the recitals in the contract being *prima-facie* evidence of the fact that this choice was offered the shippers.

8. EVIDENCE. *Admissions in bill of lading.*

Testimony that the shippers accepted and signed the conditional bill of lading without reading it is not sufficient to contradict written admissions contained therein that the shippers were offered choice of rates depending on the liability of the carrier.

9. COURTS. *Decisions of United States courts followed by state courts.*

Where a contract of shipment is an interstate one the provisions of the Carmack amendment governs the liability, in determining this liability the state courts are governed by the decisions of the United States supreme court.

APPEAL from the circuit court of Marshall county.

HON. J. L. BATES, Judge.

Suit by Rogers & Hurdle against the Illinois Central Railroad Company. From a judgment for plaintiffs, defendant appeals.

The facts are fully stated in the opinion of the court.

*Mayes, Wells, May & Sanders*, for appellant.

The first question to which we direct the attention of the court is: Was this shipment moving from New Albany, Mississippi, into and through the city of Memphis, Tennessee, in order to reach its destination at Leland, Mississippi, over two different lines of connecting

carriers, an interstate shipment, subject to and to be controlled by the Act of Congress and the decisions of the Federal courts?

We maintain that it was, and that a shipment from one point to another, both within the state, over connecting lines, which necessarily pass through a portion of another state, is an interstate shipment, within the meaning of the Federal Act as amended. See the following authorities: *Hanley v. R. R. Co.*, 47 L. Ed. (U. S.) 333; *Lord v. Steamship Co.*, 26 L. Ed. (U. S.) 224; *Steamship Co. v. R. R. Co.*, 18 Fed. 10; *Warehouse Co. v. R. R. Co.*, 41 N. W. 1047; *Sternberger v. R. R. Co.*, 2 L. R. A. (N. S.) 105; *Liebengood v. R. R. Co.*, 28 L. R. A. (N. S.) 985; *C. B. Co. v. R. R. Co.*, 132 Pac. 975.

That the shipment in question was over two connecting lines and necessarily passed into and out of the city of Memphis, Tennessee, in the course of transportation from the initial point at New Albany, Mississippi, to its destination at Leland, Mississippi, abundantly appears, from the record, and if upon the authorities cited *supra*, it is adjudicated to have been an interstate shipment, the rights of the parties to the contract of affreightment must be governed and controlled exclusively by the Act of Congress regulating commerce between the states, and the decisions of the Federal Courts construing those acts. *Express Co. v. Croninger*, 37 L. Ed. (U. S.) 314; *R. R. Co. v. Miller*, 57 L. Ed. (U. S.) 323; *R. R. Co. v. Harri-man*, 57 L. Ed. (U. S.) 6900; *Express Co. v. Burke and McGuire*, 61 So. (Miss.) 212; *Jones v. Express Co.*, 61 So. (Miss.) 165; *R. R. Co. v. Woodruff Mills*, 62 So. (Miss.) 171; *R. R. Co. v. Mugg*, 50 L. Ed. (U. S.) 1011; *R. R. Co. v. Abilene Co.*, 51 L. Ed. (U. S.) 553; *American Packing Co. v. U. S.*, 52 L. Ed. (U. S.) 681; *R. R. Co. v. Carl*, 57 L. Ed. 683; *Hart v. R. R. Co.*, 28 L. Ed. (U. S.) 717; *R. R. Co. v. U. S.*, 215 Fed. 380; *R. R. Co. v. U. S.*, 215 Fed. 380; *R. R. Co. v. Kirby*, 56 L. Ed. (U. S.) 1033; *Express Co. v. N. M. Co.*, 57 L. Ed. (U. S.) 600; *R. R. Co.*

v. *Rankin*, 241 U. S. 319; *R. R. Co. v. Prescott*, 240 U. S. 632; *G. F. & A. R. R. Co. v. Blish Milling Co.*, 241 U. S. 190; *R. R. Co. v. Wallace*, 56 L. Ed. (U. S.) 516; *Berwind-White, etc., Co. v. Steamship Co.*, 183 Fed. 257; *Cobb v. Brown* 193 Fed. 958; *Spola v. R. R. Co.*, 92 Atl. 379; *R. R. Co. v. Carl* (U. S.), cited *supra*.

It has been held by the supreme court of the United States, and by many other Federal courts, that a provision in a live stock contract, or bill of lading, covering an interstate shipment, to the effect that as a condition precedent to any right to recovery for damage for delay, loss or injury to the stock, the shipper must give notice in writing of his claim therefor before the stock are moved and mingled with other stock, or within a specified time, ranging from one day to thirty days, was valid and binding upon the shipper, and must be complied with and that failure to do so, would bar any right to recover damages for any breach of the contract. *R. R. Co. v. Harriman*, cited *supra*; *R. R. Co. v. Varnville Fur. Co.*, 59 L. Ed. (U. S.) 1137; *R. R. Co. v. Robinson*, 58 L. Ed. (U. S.) 901; *R. R. Co. v. Moore*, 58 L. Ed. (U. S.) 906; *R. R. Co. v. Cranmer*, 58 L. Ed. (U. S.) 697; *R. R. Co. v. Hooker*, 58 L. Ed. (U. S.) 868; *M. T. Co. v. R. R. Co.*, 107 Fed. *Inman v. R. R. Co.*, 159 Fed. 960; *Clegg v. R. R. Co.*, 203 Fed. 971; *Kidwell v. R. R. Co.*, 208 Fed. 1; *Smith v. R. R. Co.*, 87 S. W. 9; *Carr v. R. R. Co.*, 48 L. Ed. (U. S.) 1053; *R. R. Co. v. Phillips*, 87 Pac. 470; *I. C. R. R. Co. v. Davis*, 72 So. (Miss.) 874.

In the light of the Federal decisions therefore, it cannot be questioned that if this was an interstate shipment all state laws which declare contracts invalid, which require the bringing of an action within less than the statutory period, were superseded by the Federal law. *Ingram v. Weir*, 166 Fed. 328; *R. R. Co. v. Soper*, 50 Fed. 879; *Express Co. v. Caldwell*, 22 L. Ed. (U. S.) 556; 6 Ross notes to U. S. Reports, 420; *Cox v. R. R. Co.*, 49 N. E. 97, cited in *Harriman* case; 6 Cyc. 508 cited in *Harriman* case; *I. C. R. R. Co. v. Davis*, 72 So. (Miss.) 874, cited *supra*.

There remains to be considered by this court, section sixteen of the contract of affreightment, which requires actions for damages to property to be brought within six months from the date of delivery at its destination. The record of this case shows that this action was not brought until after the expiration of nine months or more after the date of the delivery of the property at its destination, and section 15 of the shipping contract was especially pleaded by the defendant in the court below in bar of this action.

In the case of *Howard v. Chicago, etc., R. R. Co.* (Mo. App.), 184 S. W. 906, the court held that when goods are shipped between points in the same state, and in order to reach the carrier's yards at destination, they are moved into and out of another state, the shipment is in interstate commerce so as to render valid a stipulation requiring the action for damages to the property to be brought within six months from the date of delivery at its destination. Under the Carmack amendment a carrier may, by contract, require an action against it for loss or injury to an interstate shipment, to be brought within a reasonably stated time. *Nashville, etc., R. R. Co. v. Truitt Co.*, 86 S. E. (Ga.) 421; *Ray v. M. K. & T. Co.*, 133 Pac. (Kan.) 847; *Miller v. Atchinson, etc., R. R. Co.*, 156 Pac. (Kan.) 780; *Harrington, etc., R. R. Co. v. Wichita, etc. R. R. Co.*, 156 Pac. (Okla.) 631; *M. K. & T. R. R. Co. v. Harriman*, 57 L. Ed. (U. S.) 690.

A condition in a contract for an interstate carriage of live stock, that a carrier should not be answerable for loss or damage unless action was begun within six months, is reasonable and not precluded by the Carmack Amendment. *Baldwin v. Chicago, etc., R. R. Co.*, 156 N. W. (Ia.) 17; *Enright v. Atchinson, etc., R. R. Co.*, 152 Pac. (Kan.) 629; *Sims v. M. etc., Ry, Co.*, 163 S. W. (Mo.) 275; *Thompson v. Atchinson, etc., R. R.*

Co., 185 S. W. (Mo.) 1145; *Donoho v. M., etc., R. R. Co.*, 187 S. W. (Mo.) 140; *St. L., etc., R. R. Co. v. Pickens*, 151 Pac. (Okla.) 1055; *St. L., etc., R. R. Co. v. Tallifaero*, 156 Pac. (Okla.) 359.

The stipulation for an interstate transportation of property by a carrier requiring suit for damages there-to to be brought within six months after the cause of action accrues, is to be determined under the common law, regardless of the statute of limitations of the state in which the action is begun. *St. L., etc., R. R. Co. v. Patterson*, 156 Pac. (Okla.) 216 Reported in Advance Sheets only.

It therefore appears, that the stipulation in the contract of affreightment which is under consideration in this case, was a valid stipulation and it also appears that the requirement that any suit for damages under the contract should be filed within a period of six months from the time of the delivery of the shipment, was not complied with and we respectfully submit that this failure on the part of the plaintiff in the court below to observe the requirements of the contract, was a bar to his right of action.

Coming now to a consideration of the claim made in the court below, that the provisions of the shipping contract paragraphs 13 and 16, had been waived by the defendant, we respectfully submit that the highest court in the land has decided that a carrier has no right to waive any of the provisions in its contract for interstate shipments, and we call the court's attention to the case of. *G. F. A. R. R. Co. v. Blish Milling Co.*, 241 U. S. 190, decided May 9, 1916, wherein the following language appears: "It is urged, however, that a carrier in making misdelivery converted the flour and this abandoned the contract, but the parties could not waive the terms of contract under which the shipment was made pursuant to the federal act, nor could a carrier by its conduct, give the shipper the right to ignore

these terms which were applicable to that contract and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariff's and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed. *R. R. Co. v. Kirby*, 225 U. S. 135; *R. R. Co. v. Carl, Supra*; *R. R. Co. v. Robinson*, 233 U. S. 173; *R. R. Co. v. Prescott, supra*. We are not concerned in the present case with any question save as to the applicability of the provision and its validity, and we find it to be both applicable and valid. Effect must be given to it. See, also, *Clegg v. R. R. Co.*, 203 Fed. 971; *Assurance Co. v. Building Assn.*, 46 L. Ed. (U. S.) 213; *Sullivan v. Ins. Co.*, 94 Pac. 676; *Jennings v. Smith*, 106 Fed. 139; *R. R. Co. v. Kirkham*, 65 Pac. 261; *McElvain v. R. R. Co.*, 180 S. W. 1018; *Phillips v. R. R. Co.*, 59 L. Ed. (U. S.) 774; *R. R. Co. v. Kirby*, 56 L. Ed. (U. S.) 1033; *R. R. Co. v. Robinson*, 58 L. Ed. (U. S.) 901; *Bannaka v. R. R. Co.*, 186 S. W. 7; *Olivet Bros. v. R. R. Co.* 96 Atl. 584.

We, therefore, respectfully submit that on the authorities and on the undisputed facts which appear in this record, the judgment of the court below should be reversed and judgment entered here in favor of the appellant.

*Lester G. Fant*, for appellee.

Our contention is that the Carmack Amendent does not apply to a shipment of live-stock originating in the state of Mississippi, even though the shipment, in order to reach its destination, left the state of Mississippi and came back into the state in the usual course of business. The language of the Carmack Amendment expressly excludes shipments originating in the state of Mississippi with the destination in the state of Mississippi. This language is quoted in 107 Mississippi, at pages 784, 785, in the case of the *Railroad Co. v. Lyon & Co.*, as follows:

"It has been held that a shipment will be considered interstate when it originates in one state and its desti-

nation is the same state, provided that the shipment necessarily has to go through another state in order to reach its destination; but it has never been held that a railroad company taking a shipment at one point in a state for delivery at another point in the same state can, at its pleasure, divert the shipment and take it outside of the state when they have means of transportation which should carry the freight entirely within the borders of the state in which it originated.

The interstate Commerce Act as amended by the Carmack Amendment does not in any way controvert the rights and liabilities of the parties under this shipment.

If in the case at bar they have been deprived of their right to sue, the Federal constitution would be infringed and they would be deprived of their substantive right without process of law. But even though the court should hold that this is such a shipment, then the Carmack Amendment would cover, we maintain, that the judgment of the lower court is right in view of all the federal decisions that the decision of the lower court should stand, because the supreme court of the United States, in its most recent decision in regard to the Carmack Amendment in the case of *Chicago & F. A. R. Co. v. Blesh Milling Co.*, 241 U. S. 190-199; *Cheseapeake & O. R. Co. v. McLaughlin*, the latter decided December 4, 1916. In these two cases the question of giving written notice and the time in which suit should be brought are discussed. In the reasoning of the judges giving these two decisions it is held that the stipulation of the contract for the time to give notice is addressed to a practical exigency and is to receive a practical construction, and that the special circumstances of the case may excuse a strict compliance by the shipper, and especially so when, as in the instant case, no prejudice to the carrier has resulted. Whilst it is true that, under the Act of Congress, the shipper and the carrier may not waive the substantive terms of the contract of shipment so as to release each other from the responsibility, or hold the carrier to a different re-

sponsibility from that fixed by the agreement made under the published tariffs, yet it does not follow it is respectfully submitted, that the carrier may not waive or modify the stipulation requiring notice of a claim for damages, where the waiver would not contravene the policy of the Act of Congress or result in prejudice to the carrier.

A party may waive any provision either of a contract or of a statute intended for his benefit, and a right which he might otherwise have under the constitution of the United States, when such a waiver does not contravene public policy; and the two letters of the Railroad Company's freight claim agent, appearing in the record, assume that the shipper had complied with the stipulation requiring notice of his claim or that if there had been any failure to strictly comply, the same had been waived by the railroad company. *Pierce v. Sommeret R. Co.*, 171 U. S. 641; *Shuttle v. Thompson*, 15 Wall. 151; *Smythmeyer v. United States*, 147 U. S. 358; *Pfyfe v. Elmer* 145 N. Y. 102, 104."

You will also note from the record that this local agent stated that he would recommend the payment of that claim as he thought it was just and the Railroad Company owed it. This is a circumstance that shows a reasonable compliance with the notice clause, especially when you take into consideration the fact that on the 28th, or the fourth day from the delivery of the stock, three affidavits were furnished this same agent.

The only other question then would be the question of time when the suit was brought. The shipper through his attorney was endeavoring to settle this claim. The Railroad Company before the six months had expired was in correspondence with the shipper and writing letters, as is shown by the record, which gave the shipper and his attorney a right to expect a favorable outcome of the negotiations for settlement. In order to avoid cost to the Railroad Company and delay to the shipper, suit was not brought until after the six months had



expired but we maintain without fear of successful contradiction, that the Railroad Company by every court, either state or Federal, would not be allowed by their correspondence to lull the shipper to sleep until after the six months had expired, and then claim that the action was barred.

There is however this fact clearly established in the record and uncontradicted; and that is that when the shipper, Mr. Rogers, applied to the railroad agent at New Albany to ship this cattle, that he was not given any discretion in regard to shipping under the terms and stipulations of the live-stock contract shown by this record. He testified most positively that there was no other rate offered him by which he could ship his cattle. This is not denied by the Railroad Company.

SYKES, J. delivered the opinion of the court.

Rogers & Hurdle, appellees, sued the Illinois Central Railroad Company for one thousand dollars damages, for injuries to a carload of twenty-six mules shipped by appellees from New Albany to Leland, both points within the state of Mississippi. The bill of lading shows upon its face that the car was to be transported from New Albany, Miss., to Memphis, Tenn., over the St. Louis & San Francisco Railroad Company, and at Memphis, Tenn., this carrier was to deliver the car to another carrier to be transported to the point of destination, Leland, Miss. The car was in fact delivered at Memphis to the Yazoo & Mississippi Valley Railroad Company for transportation upon its line to Leland. There is an agreement shown in the record between counsel for appellant and appellee that the Illinois Central Railroad Company in this case stands in the shoes or place of the Yazoo & Mississippi Valley Railroad Company; that if the Yazoo & Mississippi Valley Railroad Company is liable then the Illinois Central Railroad Company is liable. The record also shows that it was the agreement of the initial carrier and the shippers that the shipment

should move by Memphis, Tenn. The car was unduly delayed in transit while in the hands of the Yazoo and Mississippi Valley Railroad Company, which resulted in the injuries herein sued for.

This suit is not against the initial carrier but is against the connecting or terminal carrier. A contract of affreightment, or live stock contract, was duly entered into between the initial carrier and the shippers. Among other things this contract provides:

"The rate charges for the shipments of live stock under the following contract is lower than the rate charged if the shipment is not made under the following contract, but at carrier's risk. The rates of freight are based upon the nature and extent of liability assumed by the carrier. The shipper has the right of election whether to ship live stock under this contract at the lower rate, or not under this contract, but at carrier's risk at a higher rate.

"(1) The company shall transport the following cars of live stock, and the parties in charge thereof, viz. — cars, said to contain twenty-five head of mules, consigned to W. F. Rogers, Leland, Miss., consignee, from New Albany, Miss., station, to Memphis, Tenn., station, on the line of this company, and if the destination is beyond the line of this company shall deliver the same at said station to a carrier whose line may form a part of the route to Leland, Miss., the place of destination, at the reduced rate of ——— per car, or ———, which is less than the rate for shipments at carrier's risk. . . ."

"(13) As a condition precedent to recovery of damages for any death, the shipper shall give notice in writing, of his claim, to some general officer of the company, or the nearest station agent, or the agent at destination and before the live stock is mingled with other live stock, and within one day after its delivery at destination, so that the claim may be promptly and fully investigated, and a failure to comply with this condition shall be a bar to the recovery of any damages for such death, loss or injury or delay. . . ."

“(16) No suit or action for the recovery of any claim for damages for death, loss, injury or delay of the live stock shall be sustainable, unless begun within six (6) months next after the cause of action shall accrue, and if begun later, the lapse of time shall be conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

“(17) The shipper acknowledges that he had the option of shipping the live stock at carrier's risk, at a higher rate, or under this contract, at a lower rate, and that he has elected to make this contract and accept the lower rate.”

The testimony of Mr. Rogers, who signed the contract, is to the effect that nothing was said at the time that he signed the same between him and the agent as to any other contract of affreightment that he might have made for the transportation of these mules. His testimony also shows that he had been engaged in the business of shipping cattle and stock for a number of years.

The case was tried by agreement before the circuit judge, acting as both judge and jury. There was no controversy as to the measure of damages. The appellant railroad company, defendant in the court below, presents the same defense here as there, viz., that the contract entered into between these parties was for an interstate shipment of live stock, and that the provisions in the bill of lading govern; that under clause 13 of said bill of lading a written claim for damages was not made within one day after the stock reached the point of destination; that under clause 16 of the bill of lading this suit was not filed within six months after the cause of injury accrued.

The testimony in the record relating to these questions is as follows: Upon the receipt of the stock at Leland, Miss., before the shippers would accept the same, they had the agent of the railroad company to note on the freight bill that the “shipper received stock under condition stock in bad shape account overrun and lack feed and

water." We think this is a sufficient compliance with clause 13.

The testimony shows that there was some correspondence between the shippers and the general freight agent of the railroad company about the injuries to the stock and a settlement therefor. There is nothing in this correspondence specifically referring to the six months' limitation for bringing suit contained in the bill of lading. No extension of this time was requested or granted in this correspondence. Therefore there could be no waiver of this limitation by virtue of this correspondence. Upon the trial, judgment was rendered in favor of plaintiffs for the amount sued for, from which judgment this appeal is prosecuted.

The determinative question in this case is whether or not this was an interstate shipment of stock and is governed by the Carmack Amendment to the Interstate Commerce Act of Congress. Counsel for appellees contend that since this amendment uses the terms, "that any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state, shall issue a receipt," etc., and as the initial point and the point of destination were both within the state of Mississippi, this amendment does not govern. If this contention were correct, then the judgment of the lower court would be affirmed. However, the bill of lading in this case shows that the shipment moved from a point in Mississippi to a point in Tennessee, and thence to the point of destination in Mississippi.

Where a bill of lading shows the routing to be outside of the state, though the points of origin and destination both be within the same state, under the decisions of the United States supreme court it is an interstate shipment. "The transportation of these goods certainly went outside of Arkansas, and we are of opinion that in its aspect of commerce it was not confined within the state." *Hanley v. Railroad Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333. In this same opinion Mr. Justice HOLMES

quotes with approval from the case of *Steamship Co. v. Railroad Co.* (C. C.), 9 Sawy. 253, 18 Fed. 10, as follows:

“To bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state.”

These cases are decisive of the question that this shipment was an interstate shipment.

It is argued by counsel for appellee that the shipment could have moved wholly within the state of Mississippi, between the point of origin and the point of destination. While this may be true, at the same time the contract of affreightment routed the shipment *via* Memphis, Tenn. It was not left optional with the initial carrier to route the shipment. The Carmack Amendment was intended to and governs all interstate shipments. *Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N.S.) 257; *Railroad Co. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; *Railroad Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683.

It is contended further by counsel for appellees that this amendment does not apply because the suit is not against the initial carrier, based upon the bill of lading, but is one in tort against the connecting carrier. This question is decided adversely to this contention in the case of *Railroad Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, Mr. Justice HUGHES, in answering this contention, saying:

“The connecting carrier is not relieved from liability by the Carmack Amendment, but the bill of lading required to be issued by the initial carrier, upon an interstate shipment, governs the entire transportation, and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid. ‘The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act’ ” —citing a number of authorities.

The provision contained in clause 16, requiring the suit to be brought within six months, is a valid and binding one, and was in no wise waived in this case by the railroad company. *Railway Co. v. Harriman Bros.*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690.

The bill of lading or contract of affreightment, duly signed by the shippers, is an admission by them that they were offered by the initial carrier two separate contracts of shipment, and that they chose this one containing the stipulations above referred to in consideration of the reduced rate of carriage. Before they can avoid the stipulations in the contract the burden of proof is upon them to show that they were not offered the choice of rates referred to in this contract. The recitals in the contract are *prima-facie* evidence of the fact that this choice was offered the shippers. The testimony shows that the shippers accepted and signed the contract without reading it; but this testimony does not arise to the dignity of contradicting the written admissions contained in the contract.

"The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability. And as no interstate rates are lawful unless duly filed with the commission, it may become necessary for the carrier to prove its schedules in order to make out the requisite choice. But where a bill of lading, signed by both parties, recites that lawful alternate rates based on specified values were offered, such recitals constitute admissions by the shipper and sufficient *prima-facie* evidence of choice. If in such a case the shipper wishes to contradict his own admissions, the burden of proof is upon him." *Railroad Co. v. Rankin*, 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265.

The contract being an interstate one, the provisions of the Carmack Amendment govern the liability. In determining this liability we are governed by the decisions of the supreme court of the United States, and under these

decisions clause 16 of the bill of lading, which provides that the suit must be brought within six months, is a valid and binding clause. The appellees in this case did not bring suit within the six months provided in the contract, and for this reason cannot recover.

The judgment of the lower court is reversed, and judgment will be entered here for the appellant.

*Reversed, and judgment here.*

---

GEORGIA LIFE INS. CO. v. MISSISSIPPI CENT. R. CO.

[76 South. 646, In Banc]

*INSURANCE. Indemnity policy. Offer and acceptance. Increased recovery.*

Where a policy of insurance indemnifying a railroad company against liability for personal injury suits, provided that the insurer would, at its own costs, investigate all accidents and defend all suits, and that when the insurer had the opportunity to settle the claim of any injured employee and failed to take advantage thereof it should become liable to an increased amount, provided that the offer of settlement was submitted to the insurer by the injured employee or his duly authorized representative, and an employee of insured was killed, and suit was brought against it by the administrator and also by the widow by his next friend and the widow made an offer of compromise to the railroad company, which was by it communicated to the insurer, but no offer was made by the administrator, or by the next friend, and recovery was had against the railroad company in an amount larger than that covered by the policy. In such case the offer of compromise not having been made by the duly authorized representative of the deceased employee, the insurer was powerless to accept it, was not liable to the insured in the increased amount over the face of the policy.

APPEAL from the chancery court of Adams county.

HON. R. W. CUTLER, Chancellor.

Suit by the Mississippi Central Railroad Company against the Georgia Life Insurance Company. From a decree for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

ETHRIDGE, J., delivered the opinion of the court.

This is an appeal from the chancery court of Adams county, from a judgment against the appellant in favor of the appellee for five thousand dollars, on a policy issued by the Great Southern Accident & Fidelity Company, to the Mississippi Central Railroad Company, which policy was assumed by the Georgia Life Insurance Company.

The policy covered a period from the 11th day of November, 1911, to the 11th day of November, 1912. By his policy the insurance company, hereafter called the "company," agreed to indemnify the assured railroad company against loss for damages within the amounts named in the policy, on account of bodily injuries or death accidentally suffered by any employee of the assured while engaged in the occupations called for by the policy. Clauses B, C, D, and H of the policy are involved in this litigation, and reads as follows:

"B. Subject to the above conditions the company's liability for loss from an accident resulting in bodily injuries, including death resulting therefrom, to one person is limited to five thousand dollars (\$5,000), and, subject to the same limit for each person, the company's total liability for loss from an accident resulting in bodily injuries, including death resulting therefrom, to more than one person is limited to ten thousand dollars (\$10,000).

"C. In addition to these limits, however, the company will at its own cost (court costs and attorney's fees being considered part thereof) investigate all accidents and defend all suits, even if groundless, of which notices are given to it as hereinafter required, unless the company shall elect to settle the same, or to pay over to the assured the limits provided for in the preceding paragraph, provided that if the company elects to pay the assured the limit provided for, such



payment must be made before the return day of the suit.

"D. It is further agreed and understood that when the company has the opportunity to settle the claim of any injured employee within the limit designated in this policy, viz. five thousand dollars (\$5,000), and fails to take advantage of such opportunity for settlement within the time provided in the preceding paragraph, the company shall thereafter protect the assured from any judgment not in excess of ten thousand dollars (\$10,000), which may be rendered in favor of the injured employee. But this stipulation is of no effect, unless the opportunity of compromise as herein mentioned is submitted to the company by the injured employee, or his duly authorized representative, within the period mentioned in the preceding paragraph."

"H. The company is not responsible for any settlement made, or any expense incurred by the assured, unless such settlements or expenditures are first specifically authorized in writing by the company, provided the assured at the time of the accident has the right to provide necessary medical or surgical assistance for immediate relief and to provide means for the immediate comfort of the party or parties injured."

J. M. Winslow, an employee of the assured, engaged in an occupation covered by the policy, and in the service of the assured, was killed on the 14th day of August, 1912; said Winslow being a brakeman, and leaving as his only heirs a widow and a posthumous child. Two suits were filed against the assured, the appellee, in the circuit court of Lincoln county during September, 1912; one suit being filed by D. M. Higdon, administrator of the deceased, under the federal law; and the other by Mrs. Arcola Winslow, the widow, who also was a minor, by D. M. Higdon as next friend, under the state law. The first named of said suits was tried on the merits, in the month of January, 1913, and resulted in a judgment against the assured for twenty-

five thousand dollars. The other suit was dismissed. An appeal was prosecuted from the judgment for twenty-five thousand dollars, but was afterwards compromised for ten thousand dollars; the appellee contributing seven thousand dollars, and the appellant three thousand dollars, of the said amount of ten thousand dollars. The appellee contended, at the time of settlement, that the appellant was liable under the policy to the extent of ten thousand dollars, under clauses B and D, and the appellant insisted that it was only liable to the extent of five thousand dollars under clause B of the policy, and declined to pay the same without a full release. In this situation of the matter the settlement was effected, the appellee surrendering two thousand dollars of the admitted liability in order to leave open appellants liability for the other five thousand dollars under said clause D of the policy; and this suit was entered for the five thousand dollars under clause D, and does not involve the primary liability of five thousand dollars under the other clauses of the policy.

When the suits were brought in the circuit court, the administrator of the deceased and the widow, by herself and her father as next friend, entered into a contract with H. V. Wall, an attorney, in which contract Wall was assigned a one-half interest in the litigation, which contract was filed as required by the statute with the papers in the cause.

After the filing of these suits, and on or about the 26th day of October, 1912, shortly before the birth of the child, Mrs. Winslow, the mother of the deceased, wrote the assured, the railroad company, as follows:

"I have had a talk with my daughter-in-law, and she says she is willing to accept the compromise you stated to me, if you cannot make this sum larger. Now, if possible, please fix this for her regardless of her father and lawyer. See what can be done as soon as possible, as she is in need of the money."

Thereupon the claim attorney of the railroad company, the assured, wrote the insurance company as follows:

“Under the terms of our liability contract with your company, you are hereby formally notified that the above-styled causes, both growing out of the killing of Brakeman Winslow at Wanilla, Miss., August 14, 1912, can be settled for five thousand dollars.”

The general attorneys of the insurance company replied to this letter under date of October 3, 1912, as follows:

“We have your favor of the 28th inst., advising us that the case of D. M. Higdon, administrator, and Mrs. Arcola Winslow, against the Mississippi Central Railroad Company, can be settled for five thousand dollars. We are unwilling to make this offer.”

It is the contention of appellee that, under the terms of the contract of insurance, this constituted an offer of compromise which must be accepted by the insurance company, or else that the insurance company would be liable for all under ten thousand dollars that might be recovered against the railroad company. If the proposition had been made to the insurance company by the legal representatives of the deceased, or if it had been made by such representatives or attorney of such representatives to the railroad company and transmitted to the insurance company there would have been merit in this contention and if such had been the case the judgment of the chancery court would be upheld. But we are dealing with the completed case, with all matters that the record shows in connection therewith, and from the whole record it appears that there was no such offer of compromise in fact made, and that if the insurance company had undertaken to settle for the five thousand dollars it could not have done so.

The concluding clause of paragraph D, bearing on the compromise proposition, to wit, “but this stipulation is of no effect, unless the opportunity of compro-

mise as herein mentioned is submitted to the company by the injured employee, or his duly authorized representative, within the period mentioned in the preceding paragraph," was evidently put in the contract to prevent just such judgments as was rendered here. The proposition of compromise, under the terms of the policy, is to be submitted to the insurance company by the injured employee or his duly authorized representative within the period mentioned. The evident purpose and intention of this contract, requiring the acceptance of a proposition made in good faith, was that it should be tendered in such manner that the insurance company could accept it.

The railroad company did not abandon its efforts to compromise the litigation against it referred to above, but continued its efforts to bring about a settlement, and all the circumstances following must be taken into consideration. It is manifest from the letters of the railroad company to the insurance company that neither Mr. Higdon, the administrator, nor Mr. Wall, the attorney (having a half-interest in the matter), had been consulted about a compromise, and it plainly appears from the correspondence that the railroad company knew that Mr. Higdon and Mr. Wall would not consent to a compromise, and no proposition had ever been obtained from them justifying an assumption that a compromise could be effected. On October 31, 1912, the claim agent of the assured wrote the insurance company as follows:

"Mrs. Arcola Winslow, widow of R. M. Winslow, deceased, a former employee who was killed at Wanilla, and for whose death two suits for damages are now pending in Brookhaven, Miss., has agreed to accept five thousand dollars in settlement for herself and her child which was born a few days ago. Her father, who is the administrator, and her attorneys know nothing of this proposition of settlement, and, no doubt, would oppose it if they heard of it."

Inasmuch as the administrator and the attorney were necessary parties to make a binding settlement of this litigation, it is manifest at that time there could be no settlement, and the insurance company was under no obligation to send out representatives to run down the possible compromise.

Afterwards the agent of the assured saw one of the attorneys who had been retained by Mr. Wall to assist in the trial of the cause, and represented to such attorney that a settlement could be made but for the fact that the attorney, Mr. Cassidy, stood in the way. Mr. Cassidy replied in substance that he had never stood in the way of any settlement, and, while he would not recommend a settlement on this basis, he would not oppose it if Mrs. Winslow desired to settle for said amount.

Thereafter, about the 7th of December, the claim attorney of the assured called upon the widow and secured a letter, as follows:

"I want, if possible, to arrange a settlement of my case against your company without further trouble or litigation. I am willing to compromise for five thousand dollars and should like to hear from you at your earliest convenience."

The attorney for the railroad company thereupon took up with the attorneys of the insurance company the proposition of settling for this amount, and was told that Mr. Wall had a half interest in the matter and that his consent and an order of court on behalf of the minors would be necessary to procure such a settlement. Mr. Wall, the assignee of the half interest, learning of this effort to compromise, wrote the assured's claim attorney as follows:

"My client, Mrs. Arcola Winslow, has just seen me relative to the claim she has against the Mississippi Central Railroad Company. I do not appreciate the method resorted to by the Mississippi Central Railroad Company, through its representatives in trying to per-

sua<sup>d</sup>e my client to settle her claim without consulting her attorney. In regard to a letter she was persuaded to write you, she authorizes me to say that the settlement, if any, must be made with me (H. V. Wall); I am the man who has the contract with her, and I am the one authorized to speak for her. She will not accept your proposition, nor neither will I accept it. The case will be set for trial Thursday, January 7, and we will expect you to be ready for trial. I always try to treat everybody fair, and expect fair treatment at the hands of other people, but in this case I have not received it. Fortunately, my client desires to take my advice instead of the advice of the Mississippi Central Railroad Company."

The agent of the railroad company went to Atlanta and held a conference with the attorneys of the insurance company, in which conference the attitude of Mr. Wall was made known to the insurance company. It was also made known to the insurance company that Mr. Higdon would not consent to the settlement. It appears clearly from the testimony of Mr. Higdon, Mr. Wall, and Mr. Cassidy, that the settlement for five thousand dollars would not have been entertained by them. It is true that Mr. Cassidy testifies that if the client desired to settle he would not stand in the way, and Mr. Wall and Mr. Higdon admitted that they might possibly have settled if Mr. Cassidy had advised them to do so as a lawyer. It is manifest from the whole testimony that Mr. Cassidy would not have advised settlement as a legal proposition, and it would not have been entertained by Mr. Wall and Mr. Higdon after it was made. Mrs. Winslow and her child both being minors, it would have been necessary to procure a decree of the chancery court authorizing a settlement, and there is no pretense in the record that the matter was ever submitted to the chancery court or the chancellor, and no evidence that would warrant an assumption that it could have been compromised. The rail-

road company, the assured, had never procured an offer of compromise from any party having power to make it, and there was no offer made, either to the railroad company or the insurance company, by those competent to make such offer that would make it necessary for the insurance company to accept such compromise. We think the clause above quoted—the concluding clause of paragraph D of the contract—is a material and vital portion of the contract and must be given its proper meaning and effect as a part of the contract, and that giving it this effect precludes the appellee's recovery from the appellant, under the state of facts shown in this record. For the reasons indicated, the judgment of the learned chancery court is reversed, and judgment will be entered here for the appellant.

*Reversed, and judgment here.*

STEVENS, J. (dissenting).

There is no reversible error reflected by the record in this case, and the final decree appealed from should be affirmed. If there is any material conflict in the testimony, all doubts are removed and conflicts decided by the learned chancellor in favor of the appellee. Liability is properly imposed under paragraph D of the policy sued on and a breach thereof by the appellant Great Southern Accident & Fidelity Company. Clause D expressly provides as follows:

“It is further agreed and understood that when the company has the opportunity to settle the claim of any injured employee within the limit designated in this policy, viz. five thousand dollars (\$5,000), and fails to take advantage of such opportunity for settlement within the time provided in the preceding paragraph, the company shall thereafter protect the assured from any judgment not in excess of ten thousand dollars (\$10,000), which may be rendered in favor of the injured employee. But this stipulation is of no effect, unless

the opportunity of compromise as herein mentioned is submitted to the company by the injured employee or his duly authorized representative, within the period mentioned in the preceding paragraph."

Under this provision of the contract, if the appellant, as the insurer, "fails to take advantage of such opportunity for settlement," its liability is increased from five thousand dollars to ten thousand dollars. The proof justified the chancellor in holding that this duty of appellant was not discharged. Now, what are the facts which justified the chancellor in imposing the additional liability under clause D?

Appellee is a railway company doing the usual business of a common carrier. Appellant entered into an indemnity contract whereby it agreed to insure appellee against damages resulting from the accidental injury or death of the railway employees. Mr. Winslow was killed, and there is no question about his being an employee, or about this claim being within the terms of the policy. Mr. Higdon was appointed as an administrator and sued appellee for damages. Mrs. Winslow, the widow, also filed suit under the state law. Immediately after the filing of these suits, appellee gave due notice to its insurer of the pendency of this litigation. It appears that at that time one Mr. Buescher was the claims attorney of the appellee railway company, and that he was also the legal representative of the appellant for the purpose of making an investigation of and reporting the facts of any accident embraced within the terms of the indemnity contract. It does appear that the widow of the deceased was at the time a minor, and the proof further shows that a posthumous child was one of the beneficiaries in the suit being prosecuted by the administrator. The widow, however, was a woman of mature years and had the natural right to make suggestions or to express wishes in regard to a settlement of the suit. She was sufficiently old to be



married and become the mother of a child. She and her mother-in-law, Mrs. J. M. Winslow, were very anxious to compromise the litigation and, with that end in view, voluntarily went to the general offices of appellee in the month of October, 1912, soon after the suits were filed, and had a general conversation with Mr. Smith, the general manager of the railroad company, and Mr. Buescher, the claims attorney for both appellant and appellee. The two Mrs. Winslows not only saw Mr. Smith in person, but called him over the telephone several times and discussed a proposed settlement. After one of these conversations, the widow, Mrs. Arcola Winslow, addressed the following letter to Mr. Smith:

"Brookhaven, Miss., October 24, 1912. Mr. R. K. Smith, Gen. Manager—Dear Sir: My mother-in-law is here and has influenced me to compromise with the M. C. R. R. Co. and would be pleased to do so if they will give me a satisfactory settlement. I know that I have a good suit against the Co. but I need the money, and would rather compromise with the Co. than to wait. But if I can't get what I think it worth or a real good compromise I will let things stand as they are. Would like very much to hear from you at once. Respectfully, Mrs. Arcola Winslow. 112 East Court Street, Brookhaven."

The elder Mrs. Winslow also saw Mr. Smith, who intimated to her that possibly a settlement of the cases could be effected on a basis of five thousand dollars. It appears that Mr. Smith made a tentative offer of five thousand dollars. Thereupon, Mrs. Arcola Winslow, the widow, joined her mother-in-law in the following letter to Mr. Smith:

"Brookhaven, Oct. 26th, 1912. Mr. R. K. Smith—Dear Sir: I have had a talk with my daughter-in-law and she says she is willing to accept the compromise you stated to me if you cannot make this sum larger.

Now, if possible please fix this for her regardless of her father or lawyer. See what can be done as soon as possible as she is in need of the money. Yours respectfully, Mrs. J. M. Winslow, Mrs. Arcola Winslow."

It is conceded that the amount referred to in this letter is the amount of five thousand dollars theretofore discussed. At this time the contract of appellee was with the Great Southern Accident & Fidelity Company of Atlanta, Ga., whose liabilities were subsequently assumed by the appellant, Georgia Life Insurance Company. Mr. Buescher on October 28th, two days after the writing of the joint letter by the two Mrs. Winslows, addressed the following letter to the insurer:

"D. M. Higdon, Administrator, v. M. C. R. R. Co. Mrs. Arcola Winslow v. Miss. Central R. R. Great Southern Accident & Fidelity Company, Atlanta, Ga.—Gentlemen: Under the terms of our liability with your company, you are hereby formally notified that the above-styled cases, both growing out of the killing of Brakeman R. M. Winslow at Wanilla, Miss., August 14, 1912, can be settled for five thousand dollars. Please acknowledge receipt of this communication. Claim Attorney."

The insurer then responded as follows:

"Mr. H. S. Buescher, Claims Attorney, Mississippi Central R. R. Hattiesburg, Miss.—Dear Sir: We have your favor of the 28th inst. advising us that the case of D. M. Higdon, administrator, and Mrs. Arcola Winslow against the Mississippi Central Railroad Company can be settled for five thousand dollars. We are unwilling to make this offer. Yours truly, Jones & Chambers."

It will be noted that in this letter the general attorneys of the insurer stated unqualifiedly "we are unwilling to make this offer." Again on December 7th the widow wrote Mr. Smith, the general manager, as follows:

"Hattiesburg, Miss., Dec. 7, 1912. Mr. B. K. Smith, Gen. Mgr. M. C. R. R.—Dear Sir: I want if possible to arrange a settlement of my case against your Co. without any further trouble or litigation. I am willing to compromise for five thousand dollars and should like to hear from you at your earliest convenience. Yours truly, Mrs. Arcola Winslow."

About the same time, also, Mr. J. W. Cassidy, one of the attorneys for the administrator, wrote Mr. Buescher as follows:

"In the Winslow case, on the first opportunity when you pass through Brookhaven please bring her letter with you, as I would like to take this matter up and if possible get it off the docket. As already explained to you, I want nothing more than enough to satisfy my client, and while I would not consent to a settlement for five thousand dollars yet if she wishes it I will not stand in the way of the company adjusting the matter. I don't want to mention this subject to Mrs. Winslow unless I know for certain what was in her letter. Let us hear from you at your earliest convenience, and oblige. Yours truly, J. W. Cassidy."

Mr. Buescher then, on December 9th, addressed another letter to the insurer as follows:

"We had another letter from Mrs. Arcola Winslow, asking that we hurry the final settlement of her case. She is willing to settle for five thousand dollars. You, of course, are familiar with the terms of your contract with us, which specifies that if your company fails to settle within the limits of the liability, where an opportunity has been given to do so, it will be held liable to the extent of ten thousand dollars in case judgment for that amount is rendered. This is a serious case and will undoubtedly result in a verdict of ten thousand dollars or more. Your company is, therefore, jeopardizing five thousand dollars by not settling now. I suggest that you give this matter your earnest consideration,

as the January term of court is fast approaching. Yours truly."

At this time appellant Accident & Fidelity Company had retained the law firm of Jones & Tyler to represent its interests in this litigation. Jones & Tyler, in response to a telephone communication from Mr. Buescher, wrote a letter in which they stated, among other things, the following:

"We have your phone communication of this date advising us that these cases may be settled for five thousand dollars, Mrs. Winslow and her attorneys both agreeing to a settlement on this basis. We are writing our clients to this effect and recommending a settlement for this sum, our letter being addressed rather to Messrs. Jones & Chambers, the general attorneys."

Judge Truly, the general counsel of appellee, also investigated the cases and attempted to interest appellant in a settlement. At the request of Judge Truly, Mr. Buescher, the claims attorney, took a special trip to Atlanta and "laid the entire facts in the case before" the Accident & Fidelity Company and their general attorneys. The only satisfaction he obtained on this trip was that "Mr. Jones (general attorney) promised to let me know in a day or two what his company's decision would be." Buescher went to Atlanta December 11, 1912. On December 18th, Buescher wired the general attorneys at Atlanta as follows:

"What have you decided about Winslow matter. Delay may endanger compromise. Settlement should be arranged before Christmas if you intend making it."

Mr Smith, the general manager, also wired appellant December 21st as follows:

"See attorney Buescher's telegram nineteenth to your attorneys, Jones & Chambers, Winslow case, and answer, please."

No response whatever being made either to the communication of Mr. Buescher or of Mr. Smith, the latter again, on December 31st, wired:

"Please see my telegram twenty-first about Winslow case and answer, please."

Not getting a response to this telegram, Mr. Smith again wired January 2, 1913:

"Please let us have answer to our telegrams of December twenty-first and thirty-first about Winslow case." was the following response on January 2, 1913:

The only response then to any of these communications was the following response on January 2, 1913:

"Great Southern Accident & Fidelity Company Atlanta, Ga., Jan. 2, 1913. Mr. R. K. Smith, General Manager Mississippi Central Railroad Company, Hattiesburg, Miss.—Dear Sir: We are in receipt of your numerous telegrams in regard to the settlement of the Winslow case, and would advise that our attorneys have been out of town for the past ten days and we understand they are returning to-day, when this case will have attention and you will be advised. Yours very truly, W. J. Fagan."

The promise contained in this letter to give the matter attention was not complied with, and the proposed settlement was utterly ignored by appellant. During all this time Mrs. Winslow, one of the beneficiaries, was still willing to settle the case. Judge Truly then testified that:

"In order to specifically call their attention to the fact that the proposition of compromise was still open, on January 4th I telegraphed to Hon. R. P. Jones, general counsel of insurance company, personally by Western Union Telegraph Company as follows: If possible, arrange to be at Brookhaven Tuesday the 7th when Winslow case will be tried. What have you decided about compromise proposition?" "

To this telegram Judge Truly did not even get the courtesy of a response. The cause came on for trial January 7th thereafter and resulted in a verdict of twenty-five thousand dollars for the plaintiff. The plaintiff was represented in the trial of this suit by Mr. H. V. Wall and Mr. J. W. Cassidy. A good while prior to the conven-

ing of the court Mr. Cassidy was engaged in the trial of a case at Purvis, Miss., and there discussed with Judge Truly and Mr. Buescher a proposed settlement of this suit. Even during the trial of this case the five thousand dollar compromise settlement was discussed between counsel for the plaintiff and the defendant, and Mr. Cassidy, in response to Judge Truly's tentative offer, said:

"Why, Judge, there is no use talking about it until somebody has given authority to talk. If your company will pay five thousand dollars I will go to my folks and take it up, and I will go to my folks with my recommendation."

On being asked whether he would have settled on that basis, he responded:

"I don't know whether I would or not. What I was trying to do was to get Judge Truly to offer it. . . . If my clients had wanted to accept, I would have been satisfied in a way. In other words, I would not have stood between them and any settlement they wanted to make."

Mr. Wall, who was originally employed and who had a contract to receive fifty per cent. of whatever amount was recovered, stated that he thinks he would have accepted Mr. Cassidy's recommendation, stating:

"I rather think that I would have yielded my personal opinion in the matter to him and my client as I regard him as a good lawyer."

Mr. Higdon, the administrator, while testifying that he never did authorize anybody to settle the case, also put it beyond dispute that no agent of the fidelity company ever approached him with reference to a settlement or indicated to him any desire to compromise the case. He furthermore testified that he would have been willing to take the advice of Mr. Cassidy and Mr. Wall and would have done so in making any compromise. In the only response which the appellee or its attorneys were ever able to extract from the fidelity company or its counsel, no objection whatever was made to the form of the offer or the capacity of the parties to conclude the settlement.

The fidelity company intimated nothing about the minority of Mrs. Winslow, or about the necessity of securing a decree of the chancery court. They made no effort whatever to compromise. On the contrary, they stated without equivocation that they were "unwilling to make this offer." Manifestly, then, the fidelity company "failed to take advantage of such opportunity for settlement," and breached this express provision of the contract. Clause D was designed to make the insurer active in compromising litigation and in co-operating with the railway company in effecting speedy and satisfactory settlements. My brethren not only reverse the decree of the trial court, but enter a judgment here in favor of the fidelity company, and in doing so reward the inaction of the insurer in cases of this kind. The result reached by the majority necessarily places a premium upon appellant's wrong and sanctions fraudulent neglect. In construing clause D the manifest purpose of the indemnity contract should be kept in mind. The contract places the burden upon the fidelity company "at its own cost to investigate all accidents and defend all suits, even if groundless," and expressly provides that:

"The company is not responsible for settlements made or any expense incurred by the assured, unless such settlements or expenditures are first specifically authorized in writing by the company."

In other words, the contract forbids the assured from compromising litigation or incurring any expense other than necessary medical or surgical assistance for immediate relief. The company then attempted to tie the hands of the assured in making settlements and at the same time refused itself to settle. I am not willing to concede that the assured could not have settled the case and then recovered from the assurer the amount properly expended in effecting a settlement, in no case to exceed the amount of the policy. This point is not involved in the present litigation. The contract on its face attempts to prohibit the assured from making a settlement, and

the fidelity company is in no position to complain at the action of the railroad company in refusing to settle the case and thereby doing the very thing which the contract says that it must do. Certain it is that, under the express provisions of clause D, if the fidelity company fails to settle within the limits of five thousand dollars pending litigation, it expressly agrees to pay any judgment not in excess of ten thousand dollars. In this case it knowingly and voluntarily assumed the risk of litigation and, having thus assumed the risk, should now bear the burden. It was the business of appellant not only to entertain a compromise offer, but to seek an offer of compromise. The only question in this case is whether insurance really insures.

Stress is laid in the majority opinion upon the latter part of clause D, stating that the opportunity of compromise must be submitted to the company "by the injured employee or his duly authorized representative." The proposition of settlement in this case originated with the widow, the chief beneficiary. Whatever Mr. Higdon did in this case was in the interest of the widow and her small infant. It is an afterthought on the part of appellant to base its defense now upon the incapacity of the parties to compromise. It must be conceded that a decree of the chancery court would have been necessary, but this was a formality easy to be complied with. The case was finally compromised after the rendition of the verdict of twenty-five thousand dollars and the prosecution of an appeal to the supreme court. Appellant was at last a party to a compromise settlement, and a decree of the chancery court was obtained. Appellant is now in no position to say that this decree authorizing a settlement could not have been obtained before trial. Its absolute refusal to entertain any kind of offer effectually closed the door to any settlement and prevented any party in interest from seeking permission of the chancery court to settle. It ill becomes appellant now to harp on what it could not have done or might not have done when



it did not even try to do. It is estopped to make any such defense.

This court has uniformly construed insurance policies "most strongly against the insurance company, and most favorably for the assured., *Life Ins. Co. v. Bouldin*, 100 Miss. 660, 56, So. 613. "The language of the policy, being chosen by the insurer, it should be construed, if practicable, so as to cover the subject-matter intended to be covered. . . . The contract of indemnity will be supported, if possible." *Shivers v. Farmers' Mut. Ins. Co.*, 99 Miss. 744, 55 So. 965; *Boyd v. Ins. Co.*, 75 Miss. 50, 21 So. 708. In the case of *Employers' Liability Co. v. Light Co.*, 28 Ind. App. 437, 63 N. E. 56, it is stated:

"A well-defined distinction exists between two classes of conditions found in insurance policies. Those which operate upon the parties prior to the loss are regarded as matters of substance, upon which the liability of the insurer depends, and are to receive a fair construction according to the intention of the parties, while, as to those prescribing formal requisites by which the previously vested right is made available, a rigid construction is not allowed. *Solomon v. Ins. Co.*, 160 N. Y. 595, 55 N. E. 279, 46 L. R. A. 682, 73 Am. St. Rep. 707."

If this rule of construction is forced in the present case, the conditions "prior to the loss," those "matters of substance," expressly provided that, if appellant "has the opportunity to settle the claim" for five thousand dollars "and fails to take advantage of such opportunity for settlement," it shall be liable for ten thousand dollars. Under this rule of construction, the phrase "fails to take advantage of" is most significant. It made it the business of appellant to look after the details of the settlement and itself to secure any decree of the settlement and itself to secure any decree of the chancery court that might properly have been secured and to do this at its own cost. Instead of seeing to it that the duly authorized representative of the deceased

obtained a decree of the chancery court to settle, it refused to settle at all. In doing so it came within the principle frequently announced by this and other courts that a fire insurance company by denying liability under a policy waives proof of loss and other formal requirements. It may be legitimately inferred from the testimony that the all-controlling motive of the appellant was, as stated by its general counsel, to "get out of these cases as cheaply as possible." There is further intimation in the record that the financial affairs of the appellant Great Southern Accident & Fidelity Company were in bad condition and that the company had determined to liquidate.

In the case of *Casualty Co. v. Telephone Co.*, 139 Fed. 604, C. C. A. 588, involving a similar contract of indemnity, it is stated that:

"The contract does not contain any provision in respect to how or through what agency the insurance company should either defend or settle. Those were matters for its own determination. It might settle the suit through its attorneys, or through some local or general agent, or by some agent specially appointed. Inasmuch as its own liability was limited, it was bound to take care that no unnecessary liability was cast upon the assured by a negligent defense. So with its obligation to settle."

On the point that the insurance company cannot so construe the contract or take any action or fail to take any action to the prejudice of the assured, I direct attention to the case of *Butter v. Fidelity Co.*, 120 Minn. 157, 139 N. W. 355, 44 L. R. A. (N. S.) 609. In that case there was by the insurance company "a denial of liability and refusal to settle or defend the action." After taking this position, the company was held to have waived the other provision "of the contract making a judgment after trial of the issue a condition precedent to a recovery by the insured under the con-

tract." In *N. O., M. & C. R. Co. v. Casualty Co.*, 114 La. 153, 38 So. 89, 6 L. R. A. (N. S.) 567, the court approved the doctrine that "the insurer must be held to good faith and intelligent action in the premises." While the issues in the present case are different from the issue presented in the case of *St. Louis Dressed Beef & P. Co. v. Maryland Casualty Co.*, 201 U. S. 173, 26 Sup. Ct. 400, 50 L. Ed. 712, the conclusion I reach is within the spirit of the opinion of the court in that case. It was there said of the insurance company that, "if the defendant kept its contract, it would defend the suit and the plaintiff would have no duties." So, in the present case, if the insurance company had kept its contract it would itself have cooperated with appellee in effecting a settlement, and if it had done this it could have and would have overcome the slight obstacles in the way of concluding a legal settlement. In the case of *Brassil v. Maryland Casualty Co.*, 147 App. Div. 815, 133 N. Y. Supp. 187, the indemnity company, in accordance with its contract, undertook to defend the litigation. After the rendition of a judgment against the insured in excess of the amount of the indemnity contract, it was held that the insured, who appealed from the judgment and obtained a reversal, was entitled to recover the cost and expense incurred in the prosecution of the appeal to the appellate court. In that case the insurance company declined to prosecute an appeal. The court said:

"Having elected and undertaken to defend in behalf of the assured, it cannot be permitted to drop the defense when it suits its own purposes, without regard to his interests, and leave him stranded with an erroneous judgment against him for a large amount, seeking later to take advantage of the outcome of the appeal which it refused to prosecute itself."

In the case of *Fidelity & Casualty Co. v. Southern R. News Co.* (Ky.), 101 S. W. 900, the indemnity company denied liability and directed the insured

not to incur any costs or expenses in adjusting or settling the claim. It was held that the company could not limit its liability to the amount for which the insured might have settled the claim. Here we have the reverse of this proposition and the application of the same principle. The insurer here, under the circumstances, cannot limit its liability to the original five thousand dollars because it denied liability and refused to entertain the compromise offer.

There is a case note on indemnity insurance in 6 L. R. A. (N. S.) 562, and a discussion by the editor of the decision of the court in *Rumford Falls Paper Co. v. Fidelity & C. Co.*, 92 Me. 574, 43 Atl. 503. In that case the limit of the policy was one thousand, five hundred dollars. The injured employee offered to settle for one thousand dollars, but the insurance company elected to try the suit. The employee recovered a verdict of two thousand five hundred dollars, and the insurance company ought to be liable for the full amount although the limit of the policy was only one thousand five hundred dollars. Attention was there directed to a contract in which the insurer apparently reserved the arbitrary right or power to control settlements and thereby to involve the insurer "in greater loss than the forfeiture of the policy." It is to be assumed that the policy in that case did not contain the valuable provision which now appears in clause D of the policy here under review. I assume that the very purpose of clause D in this case is to prevent the very unfortunate situation that presented itself in the *Rumford Falls Paper Co. Case*, *supra*. Here a penalty is imposed upon the insurance company by refusing to settle and electing to litigate. In this case the insurance company no longer holds the assured "in the hollow of its hands."

For the reasons stated, I am confident in the belief that this case should be affirmed.

HOLDEN, J., concurs in this dissenting opinion.

116 Miss.]

Statement of the case.

## METROPOLITAN CASUALTY INS. CO. v. LIGHTSEY.

[76 South. 729, Division B.]

INSURANCE. *Casualty insurance. Breach of warranty. Condition of health.*

In this case, which was a suit upon a policy of casualty insurance to recover the indemnity provided for the complete fracture of two or more ribs the court held that the evidence set out in the statement of facts herein was not sufficient to sustain the defense of a breach of warranty that insured was physically sound, materially affecting the risk, when at the time of his application, he had a chronic heart trouble.

APPEAL from the circuit court of Jones county.

HON. P. B. JOHNSON, Judge.

Suit by T. Nolan Lightsey against the Metropolitan Casualty Insurance Company. From a judgment for plaintiff, defendant appeals.

Appellee, as plaintiff in the court below, sued upon a policy of casualty insurance to recover the indemnity provided "for the complete fracture of two or more ribs." From a judgment in favor of the plaintiff, the defendant prosecutes this appeal, contending in its assignment of errors that the court erred in refusing to grant a peremptory charge in favor of the defendant, and also in the principal instruction given the plaintiff. Mr. Lightsey was the local manager of the Standard Oil Company in the city of Laurel. The policy was the combination health, accident, and life policy usually written by appellant, and this particular policy was written through a local agency at Laurel. There is no question about the good faith of the plaintiff in taking out the insurance, but the contention is that certain warranties in the policy were breached. The policy makes the application a part of the contract; the provision being:

"A copy of the application indorsed hereon is hereby made a part of the contract. . . . This policy shall be void if any of the statements in the application are false, and such false statements are made with intent to deceive, or if such false statements materially affect either the acceptance of the risk or the hazard assumed by the company."

Among other things stated in the application is the following:

"I am sound and whole mentally and physically, . . . nor have I ever been subject to any chronic disease."

At the time the application was taken there was no medical examination, and, indeed, no examination whatever was required. While the policy was in force, Mr. Lightsey was kicked by a mule, and had, according to his testimony, two ribs fractured. There is no dispute in the testimony that while the plaintiff was attending to his office duties he was called on the outside to examine a mule, which the veterinary had been treating, and while the plaintiff was examining the mule he was so unfortunate as to receive a kick from the unruly animal. There is sharp conflict in the testimony as to whether the two ribs were in fact broken. The court confined the jury to the sole issue "whether or not the plaintiff sustained two-fractured ribs by virtue of his accident," and declined to give appellant a peremptory instruction. Liability is denied by appellant on the theory that the plaintiff had a chronic heart trouble at the time the application was signed and the policy delivered, and that therefore the warranty of sound health and freedom from chronic disease had been breached, and the policy is void.

*R. L. Bullard*, for appellant.

*M. W. Boyd* and *S. Freeman*, for appellee.

STEVENS, J., delivered the opinion of the court.

(After stating the facts as above). In the decision of this case we need not discuss the difference between representations and warranties in a application for insurance or the consequences of a breach of a promissory warranty. Here the company undertakes to defend by showing that the plaintiff was suffering from an organic heart trouble. In the attempt to establish its defense, it introduced the mother of the plaintiff and Dr. McCormick, a physican. The mother, Mrs. Lightsey, testified that her son had a spell of typhoid fever when he was ten years old, and that "just twice since that time there appeared to be something wrong with his heart;" but the witness was careful to add, "I could not tell whether it was his heart or not, but I think it was." This was the only testimony of the mother tending to prove heart disease. Dr. McCormick testified that at the request of appellant he examined the plaintiff August 14, 1915, after the injury sued for, and made an X-ray examination of the ribs. Most of the testimony was directed to the issue as to whether there was a fracture of the ribs, but this witness did state that Mr. Lightsey at that time had a leaky valve in his heart and enlarged lymphatic glands in the chest. He was then asked: "Could you state from the examination you made then, whether or not his heart was affected on the 1st of April that year?" His answer was: "I would think so; yes." The witness at another point reiterated his opinion that Lightsey had heart trouble at the time the insurance was written.

There is no testimony that the plaintiff knew, or was ever conscious of the fact, that he had any heart trouble, or that his heart was failing to perform its usual normal functions. There is no medical testimony as to the condition of the plaintiff before or at the time the application was signed. If the plaintiff had any organic heart disease at he time he made application for the insur-

ance, he was ignorant of that fact. But the proof is insufficient to establish with satisfaction the alleged breach of warranty. It is manifest from an inspection of the record that the contention of counsel and witnesses was directed in the main to the inquiry whether the plaintiff sustained a fracture of the ribs. On this point the evidence was in sharp conflict, and this conflict has, by the verdict of the jury, been solved in favor of the plaintiff. Conceding that the scant evidence in reference to an alleged organic heart trouble was competent, we are impressed with the belief that the court would not have permitted a verdict for the defendant, based on this evidence, to stand. *Metropolitan Casualty Ins. Co. v. Cato*, 13 Miss. 283, 74 So. 118.

*Affirmed.*

---

BURTON ET AL. v. PEPPER ET AL.

[76 South. 762, Division B.]

1. CHATTLE MORTGAGE. *Security to landlord. Receivers.*

Where a landlord takes a trust deed from his tenant to cover advances with which to make a crop, but immediately refuses to make the advances, such trust deed cannot be used as a basis for the appointment of a receiver, although it recites that it is to be also supplemental security for a balance due under a deed of trust for the preceding year, where the tenant acquiesces in the refusal of the landlord to furnish the advances and offers possession of the premises; since such acts are in effect a cancellation by agreement.

2. CHATTEL MORTGAGE. *Insolvency. Grounds for appointment of receiver.*

A landlord cannot take a deed of trust from his tenant to secure advances, and then refuse to make the advances and have a receiver appointed, although the tenant be of limited means and practically insolvent, unless he had the fraudulent intent of misappropriating the funds or was abandoning the property.

3. GROUNDS FOR RECEIVER. *Landlord and tenant. Chattel mortgages.*

A trust deed on stock, machinery, and crops given by a tenant to his landlord for a past year, is not basis for the appointment of



a receiver to farm the rented premises and use the debtor's property for the current year. The only thing the landlord can do is to sell the property covered by the trust deed either in equity or by the trustee, and the tenant is entitled, where the tenancy is treated as terminated, to an early sale.

4. CHATTLE MORTGAGES. *Action for possession. Receivers. Summary action.*

A landlord cannot gain possession of the rented premises, from the tenant by the summary appointment of a receiver without notice.

5. CHATTLE MORTGAGES. *Unlawful use of property by landlord. Right to rent.*

Where a landlord having taken a deed of trust on the machinery and stock of his tenant for supplies to be furnished, had a receiver appointed before planting the crop, and without any order therefor spent money and used the tenant's stock and machinery, taking full control of the property though doing so in the name of the receiver, pending a delayed foreclosure of the trust deed. In such case the lease will be held to have been terminated and the tenant was not chargeable with rent after the receiver was appointed.

6. LANDLORD AND TENANT. *Receivers. Grounds for appointment. Deed of trust. Foreclosures.*

To justify a receiver in a foreclosure suit there should be a clear showing of inadequacy of the security, the insolvency of the mortgagor, and a present need for the preservation and management of the mortgaged property; also that the tenant had either, removed or abandoned the premises or was misappropriating the property and placing it beyond the jurisdiction of the court, or doing some other act tending to destroy the value of the security.

7. RECEIVER. *Appointment. Notice. Necessary. Good cause. Code 1906. Section 625.*

Under Code 1906, section 625, providing that "good cause" must be shown why notice should not be given only the greatest emergency will entitle one to the appointment of a receiver without notice. Mere insolvency does not justify the appointment of a receiver to take charge of the assets of an individual debtor.

8. RECEIVER. *Application for appointment. After litigation conditions.*

Conditions in property after the institution of proceeding for the appointment of a receiver in a foreclosure suit, cannot change the legal rights of the parties as they existed at the time of the institution of the suit.

9. RECEIVERS. *Motion for removal. Intervening parties' rights.*

The joining in of creditors, after the appointment of a receiver, seeking merely their *pro rata* share in any excess after the secured creditors are paid, has no direct bearing on the rights of the original parties, in a proceeding to remove the receiver for error in his appointment.

APPEAL from the chancery court of Holmes county.

HON. A. Y. WOODWARD, Chancellor.

Bill for appointment of receiver by D. G. Pepper and other against R. L. Burton and others. From a decree overruling a motion to revoke a decree appointing a receiver, defendants appeal.

In the year 1914 appellant Burton was the tenant of, and appellee D. G. Pepper was the owner of, the two plantations in Holmes county known as Winter Quarters and Famosa. The term of the written lease was a period of five years, beginning in 1914, and the annual rent agreed upon was three thousand dollars, due November 1st of each year. Prior to the execution of this lease Mr. Burton had completed a five-year lease, and during this time the landlord appears to have furnished Burton with money with which to make his crops. In the beginning of the year the parties would agree upon an amount to be furnished and thereupon Mr. Burton, the tenant, would execute his note for the sum agreed upon and secure the same by a deed of trust upon the live stock, agricultural implements, and the crop to be raised that year. In the year 1914 the parties agreed upon an advance of eight thousand dollars. In addition to the security mentioned, there was embraced in the deed of trust about one hundred acres of wild lands in Issaquenna county. Appellee, Capt. D. G. Pepper, resided at Sardis, Miss., and his son, Hon. A. M. Pepper, at Lexington, Miss., assisted his father in looking after the plantations and in concluding arrangements with the tenant. In furnishing money to the tenant Mr. Burton would execute his note and trust deed, and the promissory note and security would then be taken by Mr. Pepper and assigned to the Bank of Lex-

ington which placed the proceeds to Mr. Burton's "plantation account." This account would be drawn upon at intervals as agreed on by Burton and Mr. A. M. Pepper. It appears that Mr. Burton made rather a short crop in 1914, and that cotton at the close of this year was selling at a very low price, said to be due to the European war and a generally depressed cotton market. Instead of selling the cotton raised in 1914, the tenant, by agreement of the parties, delivered to Captain Pepper and the Bank of Lexington the receipt for seventy-nine bales of cotton in the compress at Greenwood, and one hundred and fifteen bales with Montgomery Bros., at Yazoo City, to be held by the landlord for better prices. In February, 1915, the landlord agreed to advance Burton six thousand dollars, with which to make and gather the crop in 1915. To this end Mr. Burton executed the usual note and deed of trust, and by agreement the deed of trust not only secured the advances to be made in 1915, but expressly recited that it was to secure any balance then due by Burton to his landlord upon the unpaid indebtedness of 1914. The note and deed of trust for 1915 were executed, and by the landlord indorsed to the Bank of Lexington and filed for record. After the trust deed had been filed for record, appellee claims that Mr. Pepper then for the first time examined the records in the clerk's office and to his surprise discovered that Mr. Burton had executed two deeds of trust to the Bank of Belzoni in Washington county, covering some of the live stock embraced in the deed of trust given Mr. Pepper. There was then some negotiation between the parties seeking to have the liens in favor of the Bank of Belzoni satisfied or canceled, or if this could not be done to have the Bank of Belzoni make the advances for 1915. Mr. Burton did not succeed in having these liens canceled, and thereupon by agreement with A. M. Pepper, Mr. Burton went to Yazoo City to induce the Yazoo Grocery Company, one of his creditors, to make the advances for 1915. Mr. Burton took with him upon this mission a letter

116 Miss.]

Statement of the case.

of recommendation from A. M. Pepper. Mr. Burton did not succeed in getting the Yazoo Grocery Company to advance supplies for the year 1915, and Captain Pepper thereupon declined to make the advances or to have the Bank of Lexington do so. In this state of affairs Capt. D. G. Pepper, acting through his son, on March 9, 1915, filed his bill of complaint in this cause against Mr. Burton, asking that a receiver be appointed to take charge of the plantations and all personal property of R. L. Burton embraced in two deeds of trust above mentioned, asking a foreclosure of the deeds of trust, and that the receiver be authorized and directed to work the plantations for 1915, or to deliver to the complainant possession in order that the complainant might work or re-lease the same. The bill of complaint with exhibits thereto was then presented to the chancellor in vacation, without any notice to the defendant Burton, and the chancellor, on March 10, 1915, appointed C. H. Campbell as receiver. The receiver took possession of the plantations, and, acting under decrees from the court, planted crops for the year 1915, and was cultivating the lands and operating the plantations, when at the May term, 1915, Burton filed a motion to revoke the appointment of a receiver, and asking that if the court could not revoke and set aside generally the decree appointing the receiver, then to alter the decree which authorized and directed the receiver to take charge of the live stock and personal property embraced in the deeds of trust, and allow the defendants to bond same. Before the May term of court, the defendant Burton filed a general answer denying the material equities of the bill. In April the complainant amended the original bill in which it is averred that some of the mules had been unlawfully taken by Burton, the Bank of Belzoni, and other parties, from the possession of the receiver by means of a fictitious replevin suit, and the amendment prayed for the issuance of an injunction to restrain the prosecution of the said replevin suit. In May also certain unsecured creditors joined

in the bill. The prayer of the intervening creditors is that they be made parties complainant in this cause; that notice be given to all other creditors of R. L. Burton to come forward and file their claims with the receiver, and that all unsecured creditors be allowed their pro rata share of any and all assets remaining after the secured creditors have been satisfied. These unsecured creditors are represented by the same counsel who filed the original bill. On May 24, 1915, notice was served by the defendants that their application to the court, asking that the appointment of a receiver be revoked and that the receiver be removed, would be heard at the courthouse in Lexington at the time therein stated. Formal motion was filed by R. L. Burton, challenging the right of the complainant to have a receiver appointed, and asking that the appointment be altogether revoked. There was also an alternative prayer by the defendant that, in event the motion to revoke the appointment should be overruled, the order of appointment should at least be modified so as to permit the defendant Burton to execute a forthcoming bond for the live stock and other personal property conditioned according to law, and to abide the final decree of the court. J. W. McClintock, Bank of Belzoni, Grenada Bank, and the trustees in the trust conveyances executed by Burton to the Bank of Belzoni and Grenada Bank, the defendants interested in certain of the mules and horses pledged to said banks, joined the defendant Burton in asking for the removal of the receiver, and also joined in the request that the defendant Burton be allowed to give bond for the personal property involved in this suit. These motions were duly presented to the chancellor, and the court, upon consideration of the pleadings, motions, and certain oral testimony, overruled the motions of the defendants. From this interlocutory decree overruling the motions of the defendants, an appeal by permission of the chancellor is prosecuted to this court. The complainants offered as witnesses C. H. Campbell, the receiver, Vess Simms, a negro tenant, J. A. Long, M. L.

Smith, and A. M. Pepper, to show the general condition of the plantations and the live stock at the time the receiver took charge, and what was being done with the plantations pending litigation. Capt. D. G. Pepper also testified in his own behalf. The following letters were also introduced as exhibits to the testimony of the witness A. M. Pepper:

"Lexington, Miss., February 15, 1915. Mr. R. L. Burton, Belzoni, Miss.—Dear Mr. Burton: Confirming my telephone conversation with you yesterday I beg to say that I received a letter from father Saturday evening in reply to a letter from me in reference to advancing you money to make and gather the crop for 1915 on his Winter Quarters and Famosa plantations. He advises me that he has decided he can do nothing further in that direction, in view of the fact that you have leased another place and given other deeds of trust on part of your stock to other parties, all of which we have discovered since you were here a few days ago. He is also of the opinion that under the circumstances there would be considerable doubt of your ability to pay the proposed advances for 1915 and rent for 1915 and the balance due for rent and supplies in 1914 out of the crops of 1915, with cotton at prices now prevailing and which will doubtless prevail this fall. I therefore suggest that you take this matter up with the Bank of Belzoni and see if they desire to pay the balances you owe my father for rent and supplies for 1914, and to take over his securities given by you, which I trust they will decide to do for you, and make you whatever advances you may need. I am mailing you this letter by special delivery in care of the Bank of Belzoni, as you will doubtless desire to give same your immediate attention. Yours very truly, A. M. Pepper."

"Belzoni, Miss., February 15, 1915. Hon. A. M. Pepper, Lexington, Miss.—Dear Sir: I was surprised at your conversation Sunday over the telephone. If you will think just a little, your father does only furnish me

with one-third of the amount that it takes to run the place during the year. Your father has not furnished a single dollar that was paid this stock you was talking to me about and if I was depending on you all for the whole year I could not keep up the place. If you will think a moment the way you all furnish me you tie me up hard and fast and when my money gives out you will not furnish one cent more. I have to do the best I can the balance of the year and if I did not have no other resources what could I do? Don't it look hard that you want security on every single thing I have and only furnish less than half of the year. Now, my dear Mr. Pepper, if this is the way you are going to treat me I think it is time for us to close up our business after six years of hard work and the only time I have failed to pay my debts, it looks to me as it is little use to try to do the right thing. Now, Mr. Pepper, if you will not carry out this agreement we had the other day I will have to quit business. You agreed to have two thousand dollars in the bank for me to draw and I have drawn on the bank for this amount. As for me waiting until the 15th of March and as I understand you to say you could not let me have only one thousand dollars and that not until the 15th of March, this is clear out of the question. Now if you will not do as our agreement was we will have to get up the cotton and mules and close up our business. If you will give me a few days I can get what I owe your father, I have plenty of stuff at a reasonable price to more than pay you all I owe you all. If I get a few good days I can get through picking cotton and will be ready to settle up in full and turn over the place to you and look out for myself. Let me hear from you by return mail. Yours truly, R. L. Burton."

"Lexington, Miss., February 16, 1915. Mr. R. L. Burton, Belzoni, Miss.—Dear Mr. Burton: Your letter of 15th inst. just received. I have fully advised my father of same, and he still insists under the circumstances he would prefer for his property to lie out than to become responsible at his age for anything further under pres-

ent conditions, especially since he will be forced to borrow money this year to pay his own living expenses as he has no other income except from the rents of the property. Personally I was very anxious to have the property worked this year if the same could be done without any risk to him, but he is of the opinion that it cannot be done, consequently I am very glad indeed to note from your letter that you are in position to make a full settlement as soon as you finish picking cotton now in the field, and deliver the property to a representative who my father will appoint for that purpose. Yours very truly, A. M. Pepper."

*Elmore & Ruff*, for appellant.

The following general statement with a reference to the power of a court of equity to appoint a receiver is taken from the latest edition of *High on Receivers* on pages 5 and 6: "The power is justly regarded as one of a very high nature and not to be exercised when it would be productive of serious injustice or injury to private rights. The exercise of the extraordinary power of a chancellor in appointing receivers as in granting writs of injunction or *ne exeat*, is an exceedingly delicate and responsible duty, to be discharged by the court with the utmost caution, and only under such special or peculiar circumstances as demand summary relief. Indeed, the appointment of a receiver is regarded as one of the most difficult and embarrassing duties which a court of equity is called upon to perform. It is a peremptory measure, whose effect, temporarily at least, is to deprive of his property a defendant in possession, before a final judgment or decree is reached by the court determining the rights of the parties. It is therefore not to be exercised doubtfully, but the court must be convinced that the relief is needful, and that it is the appropriate means of securing an appropriate end, and since it is a serious interference with the rights of the citizens without the verdict of a jury and before a regular hear-



ing, it should be granted only for the prevention of manifest wrong and injury. And because it divests the owner of property of its possession before a final hearing, it is regarded as a severe remedy, not to be adopted save in a clear case, and never unless plaintiff would otherwise be in danger of suffering irreparable loss.

And since a receivership is a harsh and costly remedy, interfering seriously with the rights of persons in possession, courts of equity exercise extreme caution in the appointment of receivers and withhold the remedy until a proper case has been made therefore."

However there may be a departure from this rule in cases of great emergency. What will warrant a departure is set forth in paragraph 113 of the same authority.

Our statute enforces the same rule. It requires notice to be given save in exceptional cases where "it shall appear that an immediate appointment is necessary or good cause be shown for not giving notice." Code, section 625.

It should be kept in mind also that the remedy by a receiver "is a provisional or auxilliary one, invoked as an adjunct or aid of the principal relief sought by the action and never as the ultimate object of the action. The court must have jurisdiction independent of the receivership and a receivership is never appointed except as a measure in aid of the enforcement of some recognized equitable right." High on Receivers, par. 6.

*Boothe & Pepper and E. F. Noel*, for appellees.

The following general statement with reference to the power of the court of equity to appoint a receiver is taken not only from the text books but also from the statutes of our own state and the decisions of our own supreme court in construing the general and statutory law controlling the appointment and the duty of receivers.

"Receiver defined. A receiver is an indifferent person between the parties, appointed by the court, and on behalf of all parties, and not of the complainant or defendant only, to receive and hold the thing or property in litigation, pending the suit, to receive the rents, issues,

or profits of land or other things in question; to receive rent or other income, and to pay ascertained outgoings, when it does not seem reasonable to the court that either party should hold it; to hold possession and control of property which is the subject matter of litigation, and to dispose of the same or deliver it to such person or persons as may be directed by the court. He is said to be the arm and the hand of the court; a part of the machine of the court, by which the rights of parties are protected. When a receiver is required not only to preserve the property but also for the purpose of carrying on or superintending a trade or business he is sometimes called a receiver, or receiver and manager. A statutory receiver is one appointed in pursuance of special statutory provisions, under which the office is sometimes expressly defined." 34 Cyc, 15, 17, 18; *Mays v. Rose*, Freeman Chancery (Miss.), 703; 34 Cyc, 128, 129, 278, 352.

The receiver in this cause was applied for by appellees and appointed by the chancellor in vacation in accordance with section 625, of the Code of 1906, which is as follows: "Receivers; not appointed without notice unless, etc., A receiver shall not be appointed without the party praying the appointment have given the opposite party at least five days' notice of the time and place of making the application, and one additional day for every thirty miles of travel thereto unless it shall appear that an immediate appointment is necessary or good cause be shown for not giving notice."

"In order to obtain the appointment of a receiver the plaintiff must show first either that he has a clear right to the property itself, or that he has some lien upon it or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim. Secondly, that the possession of the property by the defendant was obtained by fraud, or that the property itself, or the income arising from it is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant." *Mays v. Rose* (Miss.), Freeman Chancery

Report, 703; *Phillips v. Elland*, 52 Miss. 721; *McDonald v. Vinson*, 56 Miss. 497; *Pearson v. Kendrick*, 74 Miss.—.

In the above case the receiver was appointed without notice for the purpose of taking charge of land, mules, wagons, crop, rents, etc. The discretion of the chancery court to appoint a receiver without notice or otherwise is and must be governed by the facts in each individual case, as has been previously shown under the authorities cited.

Our court, in two of the most recent decisions bearing upon the appointment of receivers has enlarged the doctrine and scope of receiverships and the duty of the court in connection therewith in case of *Benjamin v. Staples, Receiver*, 93 Miss. 507.

Your appellees therefore most confidently submit and pray this court that the order of the chancery court confirming the appointment of the receiver and overruling motions to discharge the receiver and to deliver the property in controversy to appellant, and the previous orders of the chancellor appointing the receiver, designating his duties, in the management of the real and personal property covered by the receivership, be affirmed.

STEVENS, J., delivered the opinion of the court.

(After stating the facts as above). The bill of complaint exhibits; and complainant's case is based upon, both deeds of trust, the one executed for the year 1914 and the renewal trust deed executed February 12, 1915. The prayer of the bill is that "all the personal property belonging to the said R. L. Burton and included in said deeds of trust, filed herewith" be advertised and sold; that a receiver be appointed to take charge of the same for that purpose; that the receiver be authorized to work or lease the plantations for the year 1915, "or to deliver said plantations to the said D. G. Pepper, complainant, landlord and owner thereof, to be worked or re-leased by him during the year 1915, as provided by the terms of said lease, default having been made by the said R. L.

Burton, lessee." There is also a prayer that the receiver be appointed without notice, in accordance with section 626 of the present Code. The right of the complainant to the appointment of this receiver depends largely upon the circumstances of the parties and their relationship one to the other. The record shows that Mr. Burton had been leasing these plantations from D. G. Pepper, his landlord, for five years, and each year during this time the landlord had agreed to make advances to his tenant, and as security therefore would take a note and trust deed at the beginning of each year.

At the time the bill was filed, the cotton of 1914 had not been sold, but by agreement between landlord and tenant was being held for a better market. The compress receipts for the cotton were in the possession of the landlord at the time he agreed to advance the six thousand dollars for the year 1915. The carrying of these receipts necessarily deferred a final settlement between the parties, and necessarily deferred a foreclosure of the deed of trust given in 1914. The proof does not show the exact agreement between the parties as to the holding of this cotton for better prices. The case as now made is presented solely upon the pleadings and the proof offered on behalf of the complainants, and the sole inquiry is whether the chancellor erred in declining to revoke the appointment and remove the receiver. Any test of the interlocutory decree appealed from really presents the question whether a receiver should have been appointed in the first instance. Inasmuch as no opportunity was given the defendant to be heard when the receiver was first appointed, the motions which the chancellor overruled is the first hearing accorded him. While it is difficult to determine the exact agreement whereby the cotton was stored in compresses and held for better prices, it does appear from the testimony of Mr. A. M. Pepper that Burton, the tenant, was privileged to secure bids on the cotton and submit them, and thereby to cooperate with the landlord in effecting a satisfactory sale.

It appears that no bid satisfactory to the landlord had been made on the cotton at the time the trust deed for 1915 was executed, or even at the time the bill was filed. The negotiations of the tenant for supplies for the year 1915 was, as usual, had with Mr. A. M. Pepper, son of the landlord, and the parties agreed upon six thousand dollars in addition to the rent of three thousand dollars. In attempting to conclude arrangements for 1915, the tenant executed a deed of trust to secure an indebtedness of nine thousand and four hundred dollars, evidenced by one promissory note for six thousand and four hundred dollars due and payable December 15, 1915, and the rent note for three thousand dollars payable November 1, 1915. This deed of trust states upon its face that it "is given and received as additional and cumulative security for that certain indebtedness described in that certain deed of trust recorded in Book 27, page 71, of Trust Deeds of the records of Holmes county, Miss. (the 1914 trust deed) and in renewal of said indebtedness and of said deed of trust for all unpaid balance or balances that may be due the said D. G. Pepper or the Bank of Lexington after the crops of the year of 1914 have been finally accounted for and sold, and credited on rent and supply account, due D. G. Pepper or Bank of Lexington, for the year 1914."

The provisions of this instrument are numerous, and very binding upon the debtor. The instrument authorizes the trustee to foreclose, and even take possession of and sell, any of the property if he thinks it is endangered as security for the debt. It also authorizes the trustee to take possession of the crops in the event of foreclosure, and to gather any portion thereof in the field, gin the cotton, and sell the same either at public or private sale. This new instrument and the notes which it was designed to secure were forwarded to Mr. D. G. Pepper at Sardis, and by the latter returned to Holmes county for record. After the trust deed was filed for record, Mr. A. M. Pepper ascertained that about ten of

the mules were embraced in deeds of trust given the Bank of Belzoni. A. M. Pepper then called D. G. Pepper over the telephone and advised him of the situation. Thereupon D. G. Pepper stated, "I cannot go any further and I want a settlement." A. M. Pepper at the same time notified Burton that his father had "decided he can do nothing further" in the direction of advancing supplies for 1915. The correspondence discloses that the tenant was at the same time saying to the landlord:

"Now, Mr. Pepper, if you will not carry out this agreement we had the other day I will have to quit business. Now, if you will not do as our agreement was we will have to get up the cotton and mules and close up our business."

Mr. A. M. Pepper, on February 16th, is insisting that his father "would prefer for his property to lie out than to become responsible at his age for anything further under present conditions. . . . Consequently I am very glad indeed to note from your letter that you are in position to make a full settlement as soon as you finish picking cotton now in the field, and deliver the property to a representative who my father will appoint for that purpose."

During that time the landlord did not visit the plantations, and had no direct communication with the tenant. The landlord was in communication with his son, and told the son "not to go any further." The proof then shows that the landlord declined to make the advances agreed upon for the year 1915, justifying his refusal on the ground that the other deeds of trust to the Bank of Belzoni had been discovered of record. So far as we can tell from the record, the same live stock pledged to the Bank of Belzoni are embraced in Mr. Pepper's deed of trust for 1914, and if this be true Mr. Pepper was holding a first lien on all the live stock. This lien evidenced by the deed of trust for 1914, had not been satisfied or canceled, and it is doubtful whether the existence of a second lien on a portion of the live stock would justify

the landlord in declining to make the advances agreed upon for the year 1915.

If it be conceded, however, that the landlord agreed to make advances for the crop year 1915 under a misapprehension of the tenant's financial condition or under a general mistake of fact, it necessarily follows that Mr. Pepper could not decline to advance the six thousand dollars secured by the 1915 trust deed, and at the same time hold and claim the benefit of this new lien. As suggested by counsel for appellants, the landlord is in the attitude of taking the new deed of trust, and, as soon as it is filed for record and before the ink on it is hardly dry, uses it as a basis of his suit for the appointment of a receiver. The proof, as we see it, justifies the conclusion that the landlord declined to execute the agreement evidenced by the 1915 trust deed and notes, and when he did so the tenant took the position that there was nothing for him to do but vacate the premises. In his letter of February 15th the tenant expressly says:

"If you will not carry out this agreement, . . . I will have to quit business."

And the most favorable view for the landlord is that the tenant acquiesced in the conclusion reached by the landlord in declining to make further advances. The record does not show that a representative of the landlord was sent to the plantations to demand possession. No formal demand was made upon the tenant to vacate, but if the position assumed by the tenant is to be construed as not only acquiescing in the refusal of the landlord to make advances, but also in giving possession or quitting business," then it necessarily follows that the last trust deed of 1915 should be regarded as an agreement unexecuted, canceled by agreement, and treated as if it had never been signed by the tenant. Most assuredly the landlord could not agree to supply the tenant, take a note therefor payable the latter part of the year 1915, and, as soon as the papers are executed, file suit for a foreclosure. The fact that such a lien

would not mature until the latter part of the year is a sufficient suggestion that it could not be foreclosed.

Even if this last trust deed is to be regarded as a binding contract to be performed by both parties, it could not be used as a basis for the appointment of a receiver upon the theory that the tenant was insolvent. The money agreed to be advanced was never paid the tenant, and even though the tenant should be a man of limited means and practically insolvent, this fact would not justify the landlord in having the court dispossess the tenant and substitute the judgment and business ability of a receiver for that of the tenant. If the tenant has agreed to borrow and the landlord has agreed to lend, then certainly the tenant should have a right to expend the funds and to manage his own business, in the absence of a showing that the tenant had the fraudulent intent of misappropriating the funds or was abandoning the property. The tenant had been managing his own plantations for five years, and each year had been spending moneys advanced by his landlord. The landlord had a perfect right to decline to make any advances for the year 1915, and thus to put the tenant upon his own resources. The rent note of three thousand dollars, for 1915, would be a preference claim protected by our liberal statutes, and there is no showing in this record that the tenant, if put upon his own resources and left to manage his own business, would not have raised sufficient crops in 1915 to pay the rent for that year. So much for the 1915 trust deed.

Was the appointment of a receiver justified under the deed of trust for 1914? As stated, the main portion of the cotton crops secured by the 1914 trust deed had been ginned baled, and deposited in compresses ready for the market. By agreement of the parties a sale of the crop was being delayed. The landlord held the compress receipts and was in position to sell this cotton at any time. If the cotton evidenced by these receipts was inadequate to pay the indebtedness due the complainant, he had a



right to demand a final settlement and foreclosure of the 1914 lien at any time and to that end to call upon the trustee in the deed of trust to foreclosure. At the time the bill was filed no demand had been made upon the tenant for a final settlement, the cotton had not been sold, and no demand had been made upon the trustee in the deed of trust to take possession of the live stock or other property covered by the instrument. On the contrary the landlord, in February, 1915, was in the attitude of taking additional and cumulative security, presumably for the purpose of holding the 1914 cotton for a better price. After the landlord declined to make advances for 1915 and refused to execute the agreement evidenced by the 1915 trust deed, he had a right to liquidate his demands against the tenant by selling the cotton in the compress, and either calling upon the trustee to foreclose the 1914 lien or to seek a foreclosure through the chancery court. As we interpret the pleadings and the proof this is the utmost right the complainant had, that is, to foreclose the past-due trust deed of 1914. In foreclosing, he had a right to the services of his trustee, and a foreclosure at trustee's sale or a foreclosure in equity. In either case the appointment of a receiver would have been ill-advised and unnecessary. If a foreclosure by the trustee, the latter could demand possession under the liberal terms of the instrument and the rights of the beneficiary fully protected. The trustee would have an adequate remedy at law for the possession of any of the live stock. If a foreclosure in equity, necessary writs of sequestration could be applied for and awarded, for the purpose of bringing the property into the custody of the court. Under a bill to foreclose the 1914 trust deed, there would be little that a receiver could do. In a foreclosure bill proper, the end sought would be a judicial sale of the property covered by the instrument. Such a bill would not contemplate the use of the properly pending litigation, and the relief sought by such procedure would not justify the landlord in appropriating the personal property of the tenant in

operating his own plantations for another year. If the landlord elected to foreclose his 1914 lien, then the tenant had a right to a speedy foreclosure and a sale of the pledged property and the proper application of the proceeds. As it is, the following unusual decree was entered by the court in this case:

"And it further appearing that it has become necessary for the said C. H. Campbell, receiver, to deliver said plantations known as Famosa and Winter Quarters, in Holmes county, to D. G. Pepper, the owner thereof, in order that the tenants and laborers thereof and thereon might be furnished sufficient supplies for food and clothing, they being in a destitute condition when said receiver took charge of said plantations, and it further appearing that said receiver for the purpose of obtaining sufficient feed for the thirty-six horses and mules now on said plantations has agreed and arranged with the said D. G. Pepper to furnish said feed until said mules and horses are sold as prayed for in said bill of complaint, in return for the work of said mules on said plantations, the same to remain under the care and control of said receiver."

From this decree it is difficult to say whether the landlord was cultivating his own plantations in 1915 or whether the receiver was in possession and operating for the benefit of the landlord. It is manifest that the tenant had been ousted of possession, and the bill of complaint in this case is made to operate as a suit for possession, and the process of the chancery court is given the effect of awarding immediate possession of the plantations to the landlord. It could hardly be said that these plantations are being operated by the receiver for the benefit of the tenant. His very live stock and agricultural implements are seized without notice and given over to the landlord to be freely used, worn, and torn, without any compensation except the "feed" of mules. The effect of this order is to deprive the tenant of the use of his property without compensation, first or last. In the report

of the receiver and the petition for this order the receiver states that he—"has delivered said plantations over to said D. G. Pepper, he having agreed to supply the tenants and laborers thereon through the present year, and agreeing to feed said mules for their work until such time as your honor may direct that they be sold and the proceeds thereof applied to the indebtedness due the said D. G. Pepper."

By this order Burton's mules, like prisoners in a foreign and hostile country, are doing service for their feed. It does appear at the time the motions came on for hearing at the May term that the cotton had been sold and the landlord was then ready to account for the proceeds, and the record does show that this cotton was then insufficient to pay what the landlord was claiming to be due. No accounting has been had, and we are not justified in drawing any conclusions as to the exact amount of this indebtedness.

It is manifest, however, that the proceedings in this cause proceed upon the idea that the lease has been terminated. The lease contract bears the stipulation that if the rental is not paid for any year the lease could be terminated at the option of the landlord, and the bill charges that the tenant had been requested to deliver over the plantations and has failed and refused to do so. The proof thus far does not prove this allegation of the bill, at least it does not show that Burton refused to deliver possession. In the prayer of the bill it is stated that "default having been made by the said R. L. Burton, lessee." If the tenant breached his lease contract the landlord had a right to demand possession and, upon failure to recover possession on demand, had an adequate remedy at law to regain the possession of the premises. The appointment of a receiver then was not necessary simply to gain possession, and even if this could be regarded as a suit for possession, summary proceedings in equity for the immediate recovery of the possession of real estate without notice would not be justified. The

use of process of the court of chancery for such purpose would be oppressive.

The situation, as we see it, justifies the conclusion that the landlord has taken possession of his own, made new contracts with the laborers and croppers, has supplied the croppers since the filing of the bill, has taken charge of the livestock and agricultural implements, and is farming his own property. He claims to be doing this under the general supervision of the receiver, but there is no order in the record authorizing the receiver to spend any money or to incur any debts. If this is the situation, then no further rent is accruing to be charged against the tenant, and the supplies being furnished by the landlord in using his own property would not be chargeable against the tenant and would not be classed as receiver's debts. The true situation seems to be that the landlord has taken full control and possession of the plantations and doing with them as he pleases, and pending a delayed foreclosure of the 1914 deed of trust is allowed to use the very property asked by him to be sold. This is unauthorized and, in fact, oppressive.

The complainant was not justified in asking for the appointment of a receiver in the first instance. The appointment was ill-advised, and the motions of the defendants to revoke the appointment should have been sustained. This is not a case where the appointment of a receiver is sought to take charge of real property to preserve rents and profits pending litigation over the rest. If it were, the appointment in such case is, as said by Mr. High "regarded as an extremely delicate branch of equity jurisdiction, and one whose exercise should be guarded with the utmost caution." High on Receivers (4th Ed.), par. 553.

To justify a receiver in a foreclosure suit, there should be a clear showing of inadequacy of the security, the insolvency of the mortgagor, and a present need for the preservation and management of the mortgaged property. There should, in this case, have been a clear show-

ing that the tenant was not only insolvent and the security insufficient, but that the tenant had either removed or abandoned the premises, or was misappropriating the property and placing it beyond the jurisdiction of the court, or doing some other act tending to destroy the value of the security. In paragraph 562, Mr. High, in discussing the rule as between lessor and lessee, says:

"The general rule already stated, denying the aid of a receiver in a contest as to title as against a defendant in possession, is applicable to the case of a lessor and lessee of real estate, and equity rarely interferes with the lessee's possession by granting a receiver. The lessee being clothed with title and possession under his lease, and being in the enjoyment of rights apparently legal, will not be deprived of his possession by a receiver, unless under very urgent and peculiar circumstances."

In the case of *Henderson v. Reynolds*, 168 Ind. 522, 81 N. E. 494, 11 L. R. A. (N. S.) 960, 11 Ann. Cas. 977, the supreme court of Indiana says:

"The exceptional cases are when the defendant is beyond the jurisdiction of the court, or cannot be found, or when some emergency is shown rendering interference, before there is time to give notice, necessary to prevent waste, destruction, or loss, or when notice itself will jeopardize the delivery of the property over which the receivership is extended in obedience to the order of the court. It must be a case of imperious necessity, requiring immediate action, and where protection cannot be afforded the plaintiff in any other way. *Continental Clay & Min. Co. v. Bryson*, 168 Ind. 485, 81 N. E. 210, and authorities cited; *Chicago & S. E. R. Co. v. Cason*, 133 Ind. 49, 51, 31 N. E. 827; High on Receivers (3 Ed.), pars. 113, 117; Beach, Receivers, pars. 140-143. It has been held that a receiver will not be appointed without notice when a court, as in this state, has the power to grant a temporary restraining order, without notice, and the same is ample to protect property until notice is given and the applica-

tion for a receiver heard and determined. *Grandin v. La Bar*, 2 N. D. 206, 213, 214, 50 N. W. 151; *McCarthy v. Peake* 18 How. Pr. 139, 140; *Fischer v. Superior Court* 110 Cal. 129, 138, 42 Pac. 561; *State v. Jacksonville, P. & M. R. Co.*, 15 Fla. 210, 286; *Nusbaum v. Locke*, 53 Ill. App. 242, 244; *Cabaniss v. Reco. Min. Co.*, 54 C. C. A. 190, 195, 196, 116 Fed. 318, 323, 324. It was said in *Cabaniss v. Reco. Min. Co.*, *supra*: 'When such notice can be given it should be given, unless there is imminent danger of loss, or great damage, or irrevocable injury, or the greatest emergency, or when, by the giving of notice, the very purpose of the appointment of a receiver would be rendered nugatory, and such instances are of rare occurrence in the federal courts, because of their power, when an injunction is asked for, to grant a temporary restraining order (Rev. St. U. S., section 718; U. S. Comp. St. 1901, p. 580 [U. S. Comp. St. 1916, section 1243a]), which may be served at the same time that the notice is served, to prevent action by the defendant or his agent, and to preserve the existing conditions, until the application for an injunction and for a receiver can be heard. *North American Land & Timber Co. v. Watkins*, 48 C. C. A. 254, 109 Fed. 101.' "

In the case thus freely quoted from there was an application for the appointment of a receiver for a growing crop and the appointment was asked without notice. The court reached the conclusion that a receiver should not have been appointed. This case also directs attention to the general rule that a receiver will not be appointed without notice except in cases of greatest emergency. As stated by Mr. High:

"Courts of equity are exceedingly averse to the exercise of their extraordinary jurisdiction by the appointment of receivers upon *ex parte* applications, and this practice is never tolerated except in cases of the gravest emergency, demanding the immediate interference of the court for the prevention of irreparable injury, or in cases

where defendant has absconded and willfully put himself beyond the jurisdiction of the court. And it may be stated as the settled practice, both in England and in America, to require the moving party to give due notice of the application to defendant, . . . that his property may not be summarily wrested from him upon an *ex parte* application." Paragraph 111.

Mr. High calls this "an inflexible rule which courts are not at liberty to disregard."

This is both the letter and spirit of our statute (section 625, Code of 1906). "Good cause" must be shown why the notice is not given. Mere insolvency does not justify the appointment of a receiver to take charge of the assets of an individual debtor. If this were true the woods would be full of receivers, at least in Mississippi. The appointment in the present case was attempted to be justified by showing the condition of the live stock and the improvements at the time the receiver took charge. The receiver when on the witness stand, was asked the condition of the mules. His response was, "Some good; some bad." There was also testimony that there was practically no feed on hand for the mules.

These after-litigation conditions cannot change the legal rights of the parties as they existed at the time the suit was instituted. There was indeed some testimony tending to prove that the tenant had practically no feed; that the laborers needed supplies, and that the plantations were at the time the receiver was appointed somewhat isolated or cut off by flood tides of the river. It still remains that the appointment of a receiver added practically nothing to the complainant's security.

The situation which Mr. Burton found himself in at the time should not be overlooked. He was engaged chiefly in raising cotton as a money crop. He, his croppers and his live stock had practically weathered the storms of winter; he had just made arrangements with his landlord for supplies for another year, and as soon as these arrangements were concluded the landlord took the very

trust deed which had just been executed and used it as a basis of having the receiver appointed without notice. If Mr. Burton then, as contended by counsel, not only released the croppers but suggested to some that they move, his conduct was more or less human under the circumstances, and possibly he was provoked into doing this by the hard and summary proceedings against him. The hardships with which the tenant was then contending could not be bettered or overcome by the receiver wresting from his possession every mule and every tool on the plantations, and thereby leaving the defendant stripped of everything in the way of agricultural implements or supplies. Of course, the landlord had no intention of injuring the tenant by the present proceedings. The necessary result of the receivership proceedings, however, well illustrates the hardships of having a receiver appointed without notice. The record shows that Mr. Burton was served first with an order of the court appointing a receiver without notice and a writ of assistance directed to the sheriff to oust him from possession of all of his property. Then followed a series of mandatory injunctions, *alias* writs to other counties, and a rule to show cause why he should not be fined as for a contempt of the court. Every possible process, it seems, was invoked except to call out the militia. On the hearing of the motions in May when crops should be growing, the court refused to allow the tenant to bond the personal property. The proof shows that only a small per cent of the croppers left the plantation, but most of them remained and were supplied and used by the receiver. So, in practical effect, the landlord has his plantations given over to him, and all the valuable live stock is delivered to him to be used merely for their feed and nothing more. The tenant is denied the privilege of bonding his property; court costs and interest charges are accruing; while the tenant, under threat of contempt proceedings, must quietly and mournfully look on, and that too at a distance.



The motions of the defendants should have been sustained and the appointment of a receiver revoked *in toto*, and the receiver discharged upon proper accounting. This being an appeal from an interlocutory decree, we are not called upon to determine the right of the complainant to a foreclosure of either trust deed under the pleadings as now framed, and we intimate nothing as to the duty of the chancellor on a remand of this cause other than revoke the appointment of the receiver and accept his final account.

The effort of the unsecured creditors to join in the bill after the appointment of the receiver has no direct bearing upon the rights of the parties on this appeal. It appears that they were communicated with by the complainant and his counsel, and came into this case seeking merely their *pro rata* share in any excess after the secured creditors are paid. Surely, the appointment of a receiver would diminish instead of increase their chances for a dividend.

*Reversed and remanded.*

---

GULFPORT & MISSISSIPPI COAST TRACTION CO. v. HICKS.

[76 South. 873, Division B.]

1. CARRIERS. *Passengers. Statutory presumptions. "Running." Code 1906, section 1985. Laws 1912, chapter 215.*

Under Code 1906, section 1985, as amended by Laws 1912, chapter 215, providing that in all actions against railroad corporations and all other corporations, companies, partnerships, and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline, or lever power and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, etc., shall be *prima-facie* evidence of the want of reasonable skill and care,

and that the section shall apply to passengers and employees of railroad corporations and other such corporations, etc. The word "running" is not to be literally applied, for otherwise the statute might be given an absurd construction but "run" should be treated as equivalent to the word "operate" and hence the section applies to a passenger on an interurban electric car who was standing on the back platform while the car was stationery awaiting a clear track and was injured by a shock received from the controller of the car upon which he was standing.

2. CARRIERS. *Carriage of passengers. Presumption. Res ipsa loquitur.* Where a passenger on an electric car received a shock while leaning against a controller, and such shock was ordinarily impossible in the absence of negligence, a presumption of negligence on the part of the carrier arises under the doctrine of *res ipsa loquitur*.

APPEAL from the circuit court of Harrison county.

HON. J. H. NEVILLE, Judge.

Suit by D. A. Hicks against the Gulfport & Mississippi Coast Traction Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*White & Ford*, for appellant.

Counsel for appellee practically abandons the principle of *res ipsa loquitur*, upon which he depended altogether in the court below, as the ground upon which he asked a verdict from the jury; and he pitches his case in this court upon our *prima-facie* statute and cites three cases from the supreme court of Georgia to the effect that under the the Georgia statute the term "running" was not restricted to actual motion, but applied to the general operation of the train, or cars or machinery.

We will undertake to show that the cases cited from the Georgia courts do not uphold the contention of appellee.

The Georgia statute provides: "A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives or cars

or other machinery of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company," (Italic ours.) *Ga. Ry. Co. v. Reeves*, 51 S. E. 610.

Under section 1645, Code of 1906, as amended by Acts of 1912, chapter 215, a *prima-facie* presumption of negligence arises in actions against railroads, corporations, companies, partnerships, and individuals "using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power and running on tracks for damage done to persons, or property, inflicted by the running of the engines, locomotives or cars," etc.

The court will note the distinction between the broad scope of the Georgia statute, which raises the presumption in cases arising from the running of cars, or machinery, stationary or otherwise, or from any act of an employee, and which puts the burden of proof in all cases upon the railroad, and our statute which restricts its application to cars, engines and locomotives running on tracks.

We can readily see how the courts of Georgia would apply the broad statute of that state to cases where the injury is not caused by the motion of the cars, but such a construction of that statute would not be a precedent for a like construction of section 1645 of the Mississippi Code, or chapter 215 of Acts of 1912.

The Georgia court in one of the cases cited by counsel, being a case where plaintiff was injured by the bursting under the wheels of a train in operation, of two torpedoes on the track, where it was doubtful whether the torpedoes were placed on the tracks by employees of the railroad or by outsiders, held that the statute did not apply until it was shown that the torpedoes were thus placed on the tracks by the employees of the defendant; holding that it was not caused by negligence in the operation of the train, but that in order to hold the defendant liable,

it must be shown that the injury was caused by the act of an employee of the company before the statutory presumption of negligence would arise. *Smith v. A. C. L. Ry.*, 62 S. E. 1021, (cited by appellee).

In another of the cases cited by learned counsel for appellee the statute is applied where a passenger was hurt while being transferred from one car to another, through the negligence of the railway company, in putting out the lights and giving the car a sudden jerk, the courts holding that a jerk of the car while a passenger is alighting is a part of the running of the car. *Georgia Ry. & Electric Company v. Reeves*, 51 S. E. 612.

*Seaboard Air Line v. Bishop*, 63 S. E. 1103, cited in the brief of appellee, was a case where a conductor on a freight train in passing over a flat car loaded with freight in the performance of his duty as conductor, and while the train was running, stepped on a nail sticking between some material on the flat car and stuck the nail in his foot. By a divided court it was held that the injury was inflicted by the actual running of the train.

The supreme court of Florida, in applying a statute identical with the Georgia statute, limits its application to cases strictly within its terms. *A. C. L. Co. v. McCormack* (Fla.), 52 So. 712; *F. E. C. Ry. Co. v. Johnson* (Fla.), 70 So. 397.

The Arkansas supreme court held that in a statute similar to ours the term "running" should be applied in its narrow and restricted sense of causing trains to be moved or propelled. *St. Louis & Santa Fe Ry. Co. v. Cooksey*, 69 S. W. 259, 70 Ark. 418.

But if we use the term "running" interchangeably with "operating," and give it the broadest possible meaning still the car in the instant case, which was standing motionless, could not with reference to this accident have been said to be operating, so as to charge an injury caused by a stroke of lightning to the operating of the car, until it is shown that those in control of it did some duty, that at least contributed to appellee's injury.

There could be no statutory presumption independent of the doctrine *res ipsa loquitur*, and if this doctrine applies it furnished the presumption of negligence itself, and, therefore there is no place for the statutory presumption.

No matter whether the term "running" is construed to include the term "operating" in its broadest sense, or is restricted to the narrowest meaning of the word used by the lawmakers, the all sufficient answer to appellee's contention is that it is nowhere shown that appellant caused, or contributed in any way to appellee's alleged injury, either by "running" or "operating" its cars or otherwise. So there is no act or omission of appellant to support the statutory presumption.

*Mize & Mize and G. E. Williams*, for appellee.

We will now notice appellant's contentions as to its grounds for complaint in the order in which they come. First, appellant says that it was entitled to peremptory instructions; that the presumption does not apply in a case of this kind. There are two answers to this: First, the *prima-facie* statute does apply notwithstanding that the car had technically stopped. The phrase, "running" of the cars, does not have reference alone to the actual motion of the cars but to the operation of the car.

A Georgia case lays down the following: The word "running" as used in the Civil Code of 1895, by section 2321, creating a presumption of negligence against a railroad company where damage is done by the running of its locomotives, cars or machinery, does not refer so much to the actual motion as it does to the general operation of its cars or machinery. *Smith v. A. C. L.*, 62 S. E. 1020, 5 Ga. App. 219.

If a car containing passengers is stopped while in transit and the passengers are directed by the conductor to change to another car which is on a track parallel to the first, and if, while they are so doing, the employees of

the company put out the lights of the first car and caused it to jerk suddenly, resulting, in injury to a passenger who is in the act of making the change, this would be "injury resulting from the running of the cars." *Ga. Ry. & Elec. Co. v. Reeves*, 51 S. E. 610, 123 Ga. 697.

This is practically the instant case. Here appellee was waiting to get around a disabled car, when all of a sudden by shock from the controller of the car he was on, appellee was injured.

Where a train pulls up to a station and stops and a passenger in alighting is injured because the step of the car is broken or wanting, technically speaking the train is not "running" in the sense of being in actual motion at the instant when the passenger is alighting. But he is injured by the running of the train in the sense that it is being operated, and that as a part of such operation, the company must allow passengers proper opportunity for alighting.

*Seaboard Air Line v. Bishop*, 63 S. E. 1103, 132 Ga. 71. thus holding that when a train is stopped at the station and a passenger is alighting and the step of the car is broken and the passenger is injured, the *prima-facie* statute applies.

But second, if we should be mistaken in this, the doctrine of *res ipsa loquitur* applies, as laid down in the case of *Railroad v. Groome*, 97 Miss. 207.

STEVENS, J., Delivered the opinion of the court.

On all points raised by appellant this case must be affirmed. The only assignment which merits any discussion is the contention that the *prima-facie* statute (section 1985, Code of 1906, as amended by chapter 215, Laws of 1912) is not applicable to the state of facts presented by this record. This statute as amended reads:

"1985 (1808). Injury to persons or property by railroads *prima-facie* evidence of want of reasonable skill and care, etc.—In all actions against railroad corpor-

ations and all other corporations, companies, partnerships and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives or cars of any such railroad corporations or such other corporation, company, partnership or individual shall be *prima-facie* evidence of the want of reasonable skill and care of such railroad corporations, or such other corporation, company, partnership or individual in reference to such injury. This section shall also apply to passengers and employees of railroad corporations and of such other corporations, companies, partnerships and individuals."

In this case the plaintiff was a passenger upon one of the regular interurban electric cars of appellant company. His injury was the result of a shock by electricity from the controller of the car, against which the plaintiff was leaning. The plaintiff was standing on the back platform of the car smoking; there was a disabled car just ahead, and the car on which plaintiff was a passenger had stopped and was waiting for a clear track. It is contended that the phrase in the statute "running of the cars" contemplates the actual motion of the cars, and that, inasmuch as the car on which plaintiff was shocked was not moving, the *prima-facie* statute does not apply. This statute, we think, has reference to something more than the actual locomotion, and should be interpreted as meaning the operation of the car. To give to the word "running" its literal meaning would narrow the application of the statute, circumscribe its effect, and greatly impair its usefulness as a salutary rule of evidence. The statute takes account of the hazard to passengers and employees from "dangerous agencies of steam, electricity, gas, gasoline, or lever power," and makes the proof of injury "inflicted by the running of the engines, locomotives, or cars" *prima-facie* evidence

of the want of reasonable skill and care of the defendant company, partnership, or individual "in reference to such injury." The object of the statute justifies us in refusing to give to the word "running" a literal construction. If we did, we could easily reach conclusions that would be more absurd than reasonable. Under such interpretation, to be logical, the locomotive or cars would always have to be in motion before the statute would apply, and we can conceive of many instances clearly within the scope and purpose of the act where the injury would be inflicted by the negligent operation of the cars. Under such literal construction as contended for, the sudden stopping of a car resulting in injury would not really present a case of "running." If there should be a head-on collision and derailment, a passenger might not be injured at all while the cars were in motion, but could easily be broken up by a derailment, or injured by water, escaping steam, or fire resulting from such collision. In the present case the car was actually engaged in transporting passengers and had stopped momentarily, waiting for a clear track. The trolley wire was a high tension wire conveying a heavy voltage of electricity. Under the theory and proof for the plaintiff the controller against which Mr. Hicks was leaning should not and under normal conditions would not have been charged with electricity. The fact that the controller was heavily charged, and that voltage was so great as to knock appellee down, is sufficient to raise a presumption of negligence against the company. It was not error, therefore, to grant the instruction complained of. There is very little difference between the Georgia statute and our statute, and the views we express and the interpretation we place upon our statute is in line with the construction placed by the Georgia court upon their statute, as shown by the opinions in *Georgia Ry. Co. v. Reeves*, 123 Ga. 697, 51 S. E. 610; *Seaboard Air Line v. Bishop*, 132 Ga. 71, 63 S. E. 1103. In the Bishop Case the court employed the following illustration:



“A train pulls up to a station, and stops. A passenger in alighting is injured because the step of the car is broken or wanting. Technically speaking, the train is not ‘running,’ in the sense of being in actual motion, at the instant when the passenger is alighting. But he is injured by the running of the train in the sense that it is being operated, and that, as a part of such operation, the company must allow passengers proper opportunities for alighting.”

In the present case, according to the plaintiff's testimony, the agency which caused the injury was under the control of the defendant, and it is shown that under normal conditions, with proper equipment, the proper insulation of wires, the use of lightning arresters, and by having the controller properly grounded, the accident would not happen. If the accident under ordinary circumstances would not happen if reasonable care is employed, then the negligence of the defendant should be presumed, and this presumption should yield only to positive proof. The history of our present statute must be kept in mind. As it appeared in the Code of 1880, section 1059, it did not embrace or protect passengers. In its present form it is expressly made applicable to passengers. This fact materially differentiates the present case from *Railroad Co. v. Trotter*, 60 Miss. 442.

In so far as the doctrine of *res ipsa loquitur* may be applicable to the present case, the Trotter Case is authority. It is there stated by Judge COOPERS:

“As to injuries resulting from causes which ordinarily exist only by reason of the negligence of the carrier, it has been held that proof of the injury and the character of the carrier is sufficient to establish a *prima-facie* right of recovery, and to entitle the plaintiff to judgment unless rebutting testimony is introduced by the carrier, *Hutchinson on Carriers*, 801, and authorities cited.”

See, also, *Railroad Co. v. Conroy*, 63 Miss. 562, 56 Am. Rep. 835.

Our court, in *Railroad Co. v. Humphrey*, 83 Miss. 722, 36 So. 154, reviewed and discussed the holding in the Trotter and Conroy Cases, and, among other things, stated:

"In the Conroy Case the plaintiff was injured while a passenger, by the running of the train, but that injury was caused by a collision of the train with an animal on the track, and therefore, from the nature of the accident, negligence of the carrier was implied, but this was not by reason of the statute, but because the doctrine of *res ipsa loquitur* applied."

It will be noted that the instruction complained of in the case at bar simply told the jury that if they believed from the evidence that the plaintiff was injured the law presumes that this injury resulted from the negligent failure of the defendant company to furnish a reasonably safe and secure car in which the plaintiff was entitled to ride, and if the plaintiff was injured by the controller, as testified to by him, then he had made out a *prima-facie* case. The court did not, in this instruction, expressly say that our statute applies, but as stated by Judge TRULY, speaking for the court in the *Humphrey Case, supra*:

"In such cases proof of injury to the passenger joined to the proof of the accident makes out against the carrier a *prima-facie* case of failure to observe that high degree of care required of it under the law, and, if not rebutted, entitles the plaintiff to recover."

It may be conceded, then, that the statutory presumption conspires with the doctrine of *res ipsa loquitur*, and that both are applicable under the facts of this case. Our court, in *Railroad Co. v. Groome*, 97 Miss. 201, 52 So. 703, discusses the maxim *res ipsa loquitur*, and states that:

"It is applicable 'where, under the circumstances shown, the accident presumably would not have happened if due care had been exercised.'"

In the Groome Case appellee Groome was an employee of the railway company and in the discharge of his duty stepped from a train of cars upon a defective plank walk between a side and main track of the railway company. That case, in so far as it discusses the application of the maxim as between master and servant, of course, is not in point here. See, also, *Berry et al v. Cumberland Tel. & Tel. Co. et al.*, 95 Miss. 729, 50 So. 69.

Our present section 1985, Code of 1916, was applied in the case of *Illinois Central R. R. Co. v. Thomas*, 109 Miss. 536, 68 So. 773; a case where fire was set out by one of the locomotives of the railway company. It was there stated:

“On the evidence we think the question of whether or not the fire was set out by this train was for the jury, and if it was set out by this train, then under section 1985 of the Code, negligence on appellant’s part in this connection must be presumed, there being no evidence disclosing the facts and circumstances under which the fire was in fact set out.”

Suppose the locomotive which set out the fire in the Thomas Case had been standing upon the track at the time the sparks were emitted, could there be any different application of the statute? Proof of the injury is, of course, made the basis of any application of the statute. According to the plaintiff’s testimony in the case at bar, he was injured by an unusual current of electricity conveyed through an instrument that under normal conditions would be innocent and harmless; a necessary appliance, however, in the transportation department of appellant.

It is interesting to observe the construction placed by the supreme court of the United States upon our *prima-facie* statute. *Mobile, J. & K. C. R. R. v. Turnipseed*, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 35, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463. The court, by Mr. Justice LURTON, uses the word “operation” as synonymous with the statutory word “running.” The opinion

says, "injuries arising from the actual operation of railway trains or engines; and again, "evidence showing an injury due to the operation of trains or engines is only *prima-facie* evidence of the want of reasonable skill and care," etc. The injury here sued for, according to the plaintiff's theory and proof, was due to the operation of the cars, and this being so, our statute applies. The supreme court of Georgia, in *Augusta & S. R. Co. v. Randall*, 79 Ga. 305, 4 S. E. 674, refers to the statutory presumption as being really a common-law presumption which did not for the first time originate in the statute. This is persuasive that in the present case the statutory presumption and the maxim *res ipsa loquitur* conspired to make for the plaintiff a *prima-facie* case, and consequently there was no error in granting the instruction complained of.

Our attention has been directed to no case which puts at rest any question as to the application of the statute to a state of facts here presented, and for that reason we have thought it well to express our views on this point. The other objections argued are not well taken.

*Affirmed.*

---

LAKE ET AL. v. CASTLEMAN.

[76 South. 877, Division B.]

**MORTGAGES. Trust deeds. Foreclosure. Notice. Sufficiency. Code 1906. sections 1607-2772.**

Under Code 1906, section 2772, providing that sales of lands under mortgages shall be advertised for three consecutive weeks preceding such sales, and section 1697 providing that when publication is required for three weeks, it shall be sufficient to publish once each week for three weeks, though there be not three weeks between the first and last publication, but there must be three weeks between the first publication and the day for appearance

of the party, a notice of foreclosure sale which was published on October 8, 15, 22 and 29 followed by a sale on November 2nd, and a publication on July 7, 14, 21 and 28, followed by a sale on July 31, were sufficient; less than a week having elapsed between the day of the last notice and the day of sale in each case.

APPEAL from the chancery court of Washington county.  
HON. E. N. THOMAS, Chancellor.

Suit by Pauline Castleman against J. Albert Lake and others. From the decree rendered, Lake and others appeal.

The facts are fully stated in the opinion of the court.

*A. W. Shands* and *G. G. Lyell*, for appellant.

The bill was one to cancel and remove the alleged cloud upon title of appellee and to enjoin further foreclosure by appellants of their junior deed of trust.

In proceeding to advertise for such foreclosure, it was the theory of the appellants that the two sales by Cashin, Substituted Trustee, were void because the notices of sales were not published for the time required by the provisions of the deeds of trust and section 2772 of the Code of 1906. That is the sole ground of attack upon such two foreclosures; and, as before stated, is the only question in this case.

We turn now to the provisions of the two deeds of trust as to the time and manner in which the notices of sale were required to be given. Taking them up in their order of priority, we consider, first, the D/T executed March 13, 1909, to the Georgia State Savings Association.

It provided, Tr. 13, that "the trustee, or his successors, shall proceed to sell the said property at public outcry, to the highest bidder for cash, in front of the court house of said county (Washington) after advertising said proposed sale and posting notice of same for three consecu-

tive weeks preceeding such sale as provided by section 2772 of Code of 1906 of the state of Mississippi, as amended, such sale to be made on any day except Sunday, at which sale the said Association may become a bidder." The case was tried upon an agreed statement of facts. See stipulations of Counsel.

It is therein agreed that Cashin, Substituted Trustee, advertised and published his sale notice for foreclosure of this D/T. in the Greenville Democrat, a daily newspaper published in the city of Greenville, on the following dates: October 8th, 15th, 22nd, and 29, 1914, and that the sale was made on November 2, 1914. The court knows, judicially, that the dates of publication were Thursday and that the sale day was Monday. It will be thus observed that an interval of from Thursday, October 29, until Monday, November 2nd., intervened between the last publication and the sale day. Appellants contend that such interval rendered the sale void.

Turn now to the next deed of trust that was foreclosed, that to the Grenada Bank, dated March 19, 1912. The record shows that the following was the provision of same for foreclosure by the trustee: "The trustee herein may take possession of said property and sell the same at public outcry, after giving legal notice of the time, place and terms of sale in the county in which the property is located."

Now it is agreed, that the notices of sale were published in the Greenville Democrat, a daily newspaper of following dates: July 7th, 14th, 21st, 28, 1914, and that the sale was made on July 31, 1914, and that the sale was made on July 31, 1914, the time fixed in said notice. The court knows, judicially, that the notices were published on Tuesday and that the sale was made on Friday.

As to this sale, appellants contended that it, too, was void for the reason that too much time elapsed between the last publication of the notice of sale and the day of sale.

In other words, it is contended that "a legal notice" within the purview of the two deeds of trust and section 2772 of the Code of 1906, was not given in either case.

If the sales were void, or either of them, it is obvious that the injunction should have been dissolved. Removing clouds upon titles p. 550, and authorities cited.

No attack was made by appellee upon the validity of the D/T. of appellants, except that it was subsequent in time to the two under which she deraigned her title. Appellant's right to foreclosure was clear unless the two sales by Cashin, Substituted Trustee, were valid.

Let us now consider the pertinent provision of section 2772 of the Code of 1906, "How lands sold under mortgages and deeds of trust." Omitting what is not here involved, it reads: "Sale of lands shall be advertised for three consecutive weeks preceding such sale, in a newspaper published in the county. . . ."

"No sale of lands under a deed of trust or mortgage shall be valid unless such sale shall have been advertised as herein provided, regardless of any contract to the contrary. An error in the mode of sale such as makes the sale void will not be cured by any statute of limitations, except as to the ten-year-statute of adverse possession."

Independently of the provisions of the statute, the law is settled that: "If the notices of sale are not made and published according to the power, the sale is absolutely void, not merely voidable, and no title passes to the purchaser" Perry on Trusts and Trustees (6 Ed.), 602, page 1009, 782, page 1288, 600t, page 1005; *Enochs v. Miller*, 60 Miss. 19; *Allen v. Alliance Trust Co.*, 84 Miss. 319, 332.

As illustrative additional authorities, that the execution of powers is *strictissimi juris*, see Brief of Messrs. Percy & Campbell in the latter case at page 325. *McMahan v. A. B. and L. Asso.*, 75 Miss. 965 969; *McCaughn v. Young*, 85 Miss 277, 289.

116 Miss.]

Brief for appellant.

Briefly stated, our contention, as applied to each case is, that the words of the statute, 2772, "Sale of lands shall be advertised for three consecutive weeks preceding such sale" means the three weeks immediately preceding such sale; and that when the publication is in a daily paper that it is always necessary to publish the notice for such time immediately preceding the sale, and that unless that is done that the sale is void. That while it is true that the publication is a daily paper for once a week, for three weeks, is satisfactory under the statute, 2772 and 1607, there should be no such interval between the date the notice is last published and the sale day.

The publications in the instant case (and the same is true in the companion case, No 19, 798), were completed several days before the sale day. In the foreclosure of the Grenada Bank D/T. the last notice of sale appeared in the Daily Greenville Democrat on Tuesday before the sale on Friday. And so, too, when the other deed of trust, to the Georgia State Savings Association, was foreclosed, The last sale notice was published on Thursday and the sale was made the following Monday.

It thus appears that the publication was completed several days before the sale under each trust deed and it was not contemplated that it should appear again.

In this case, the publication being made in a daily paper, it was possible, and we submit the duty, of the trustee to make the publication cover the period of time immediately preceding the sale. That is to say he should have published the last notice either on the morning of the sale or certainly the preceding day. This was not done in either case, and we submit that the sales were both void.

Of course, where the publication is of necessity in a weekly newspaper, it is not always possible to have the last notice immediately precede the sale in publication of such notice, and in such cases we do not dispute that our statute and the law will be complied with even though



there may be an interval of less than a week between the date of last publication and the sale day. In such case, the law does not contemplate or require the impossible to be done. But in case of publication in a daily newspaper, selected by the trustee, just as he selects the sale day, what we contend for can be effectuated and ought to be.

What is meant by the words, "consecutive weeks" in 2772? It undoubtedly means in a successive manner in a series, or order, following in order, or uninterrupted in course. The words, "for" has been defined by the supreme court of the United States as "duration when it is put in connection with time." *Early v. Dowe*, 16 How, 610 14, L. Ed. 1099. The remaining important word in 2772, is "preceding." We submit that the word means "next before." 31 Cyc, 1157; 22 A. & E. Ency, of Law (2 Ed.), 1171, defining "preceding." Now if the word "preceding" means, and is employed in what the two authorities cited state is its usual meaning, then it is clear that the publication was not properly made in this case for either sale, nor in the companion case. See *McMahan v. American B. & L. Asso.*, 75 Miss. 965, where our court held that where the trust deed required publication for "four weeks next before the day of sale," that the sale was void where nine days intervened between the last advertisement of sale and the sale day. Our court held that there should have been a strict compliance with the provision in question.

It is obvious that in connection with the advertisement of the sales that "the week need not necessarily commence on the morning of the first day of which has been denominated the Biblical week." *Raunn v. Leach*, 53 Minn. 84, 87, 54 N. W. 1058.

There is no statutory definition of "week" limiting it to the Biblical week. In fact the construction given all statutes requiring notice for a certain number of weeks ignore the Biblical week.

It is clear, therefore, that the word "week" in 2772 means merely a period of seven days' time, and that the

116 Miss.]

Brief for appellee.

“three consecutive weeks preceding such sale,” contemplated by 2772 is that twenty-one days’ period immediately preceding the sale day. 1606 provides that, in counting time the day of serving the process or giving the notice shall be excluded and the day of appearance included; and in all other cases when any number of days shall be prescribed, one day shall be excluded and the other included.”

Now we have called attention to the fact that in the foreclosure of the two deeds of trust involved in this suit, that as to one, the notice of sale was last published on Tuesday for a sale of the subsequent Friday and the other sale notice was last published on Thursday for a sale on the following Monday.

In other words, the publication was not made for “three consecutive weeks preceding such sale.”

The trustee chose the sale day in each case of foreclosure, and he chose a daily paper for the publication of the sale notices. It was possible, and mandatory in such latter case, that the last notice of sale should have immediately preceded such sale. We submit, therefore, that each sale was utterly void.

*Campbell & Cashin*, for appellee.

As we understand the brief of counsel for appellant their argument is that the two sales mentioned were void because not made on the date of the last publication or on the next day after the last publication. In other words that section 2772 of the Code means that in no event must more than one day elapse between the last publication of a notice of sale and the date of the sale of lands under trust deeds, and that this is the meaning and proper construction of section 2772 of the Code.

If by the words “sale of said lands shall be advertised for three consecutive weeks preceding such sale, in Section 2772 of the Code the legislature meant, as argued by counsel, three weeks, “Immediately preceding” said

sale, it would have been very easy for the legislature to have said so. In as much as they did not use this language, is not the presumption that they meant what they said, and not something which they did not say. If the legislature meant by section 2772 of the Code that the sale must be made on the day of the last publication of the notice of the sale, or at the farthest the next day after the last publication of the notice of the sale, as argued by counsel for the appellant, why did they not say so. But we submit that even if "three consecutive weeks preceding such sale" meant "immediately preceding the sale," the publications in this case were made for three weeks immediately preceding the sales.

If more than a week had elapsed between the last publications and the date of the sales this would not have been true, but the sales under the trust deeds involved in this case were each made on the third day after the completion of the advertisement for three consecutive weeks, immediately preceding the sales.

Counsel for appellant say that it was the duty of the trustee to make the last publication of the notice either on the morning of the day of the sale, or certainly the next succeeding day. Why? They fail to suggest any reason therefore, and cite no authority to support their assertion. Under the rules of logic, would it not be permissible for us to meet this assertion with counter assertion and say that no such duty devolves upon the Trustee?

Prior to the enactment of the Code of 1906, the statute did not require sales of lands under mortgages and trust deeds to be advertised for any particular time, the manner and length of time for such advertisements being left to agreement between the grantors and beneficiaries in mortgages and trust deeds.

The usual custom then was to advertise sales under mortgages and trust deeds by posting a notice of such

sales at the front door of the court house of the county in which the land or some part thereof to be sold was situated ten days before the date of sale.

Sec. 2443, Code of 1892, it is a fact known of all men that very few people see notices of sales posted at the front door of court houses. It is equally as well known that most people read their local papers, even the advertisements therein as a matter of curiosity, if for no other reason. It is evident therefore, that the purpose of section 2772 of the Code of 1906, is to give publicity to the fact that a sale of property will be made at a certain time and place. Is not this purpose accomplished just as well by giving notice by publication for three consecutive weeks before that time that I will on the 31st day of July sell certain lands at the front door of the court house of the county in which the land is situated at public outcry to the highest bidder for cash, at or about the hour of 12 o'clock noon, as it is by giving notice by such publication that I will sell it at said time and place on the 28th or 29th day of July, or that I will sell certain lands on the 2nd of November, as that I will sell it on the 30th day of October?

There was no such unreasonable interval of time between the last publication of the notices of these sales and the day of the sales in the case at bar as to cause interested persons to forget all about the sale or the date fixed therein.

Counsel for appellant admit that where the publication is of necessity made in a weekly newspaper it is not always possible to have the last notice immediately preceding the sale in the publication of such notice, and in such cases they say, and we don't dispute the fact that the statute and the law will be complied with, even though there will be an interval of less than a week between the date of the last publication and the sale date. If this is correct, and we concede that it is, that demonstrates the

fallacy of the balance of the argument in their brief. Why should there be any difference in respect to the rule that the sale may be made at any time within a week after the date of the last publication, whether the publication be in a weekly or in a daily newspaper? If the object of the notice is carried out in good faith, as in the instant case, what difference can it possibly make to anyone whether the notice be given by publication for the required length of time in a daily or in a weekly paper.

The case of *McMahan v. Am. B. & L. Ass'n*, 75 Miss. 965, while unquestionably sound in law is not in point. Clearly in that case the sale was not advertised for four weeks, "next before the day of sale" because more than a week, to wit: nine days had elapsed between the last publication of the notice of the sale and the day of the sale. In the case at bar the sale was made on the third day after the last publication of the notice of the sale, which we respectfully submit complied with the requirements of section 2772, of the Code and the object and purposes of that statute.

The course pursued by the trustee in this case is the course that has generally been pursued in this and in neighboring counties since the adoption of the Code of 1906. The opinion of the bar is that if a sale is made within one week after the completion of three weeks' publication preceding the sale, then the provisions of section of 2772 of the Code as to notice of sale is complied with. If we are wrong in this construction, then more than ninety per cent. of the sales of lands made under trust deeds within the last ten years in this section of the country are void and can be set aside. Such a result at this time would bring ruin upon hundreds of citizens in the Delta section of the state, and we have no doubt in other sections of the state also.

We respectfully submit that the decree of the court below is correct and should be affirmed.

STEVENS, J., delivered the opinion of the court.

This appeal presents one narrow technical point. Appellee, Mrs. Castleman, was a purchaser of the real estate at a foreclosure sale made by the trustee under two certain deeds of trust; one sale being made on July 31, 1914, and the other November 2, 1914. It is appellants' contention that the trustee did not advertise for the time required by the provisions of the deeds of trust and section 2772, Code of 1906. The sales were upheld by the chancellor, and his decree made perpetual an injunction at the suit of appellee, seeking to restrain a sale under a junior lien, and confirmed appellee's title.

The validity of the two sales under the deeds of trust, through the foreclosure of which appellee became purchaser, is involved. Under one of these foreclosure proceedings, advertisement of the sale notice was carried in the Greenville Democrat, a daily newspaper, and the notice was published October 8, 15, 22, and 29, 1914, and the sale was made November 2d thereafter. In the other proceeding the notice was published in the same newspaper July 7, 14, 21, and 28, 1914, and the sale was made July 31, 1914, the time fixed in the notice. Under the first notice there was an interval from Thursday, October 29, the date of the last publication, until Monday, November 2, 1914, the day fixed for the sale. In the other proceeding there was an interval of two days between the date of the last publication and the day of sale. It is contended that, under section 2772 of the Code, "sale of said lands shall be advertised for three consecutive weeks preceding such sale" refers to the three weeks immediately preceding, and that, if the publication is made in a daily newspaper, the notice should be published up to the very day of sale, and because there were issues of the daily paper during the several days' interval between the date of the last publication and the day of sale, when no notice appeared in the daily paper, there is a fatal defect in the title

upon which appellee relies. The argument is made that it was the duty of the trustee to keep the advertisement in the issue of the paper on the morning of the day of the sale, or certainly on the day next preceding. It seems to be conceded by counsel for appellants that, when the publication is made in a weekly newspaper, it is not always possible to make the publication on the day immediately preceding the sale, but that in such case a publication in the last regular issue of the paper preceding the day of sale is sufficient.

In their contention that there was a defective or insufficient advertisement of the two trustee's sales, appellants are wrong. Section 1607, Code of 1906, expressly provides that:

"When publication shall be required to be made in some newspaper for three weeks, it shall be sufficient to publish once each week for three weeks, even though there be not three weeks between the first and last publication; but there must be three weeks between the first publication and the day for the appearance of the party or other thing for which the publication shall be made."

The trustee complied with this section, as also the provisions of 2772. It follows that the sales made by J. M. Cashin, substituted trustee, are valid, and the decree appealed from must be affirmed. See *Weston v. Hancock*, 98 Miss. 800, 54 So. 397. It will be noted that more than one week did not elapse between the date of the last publication and the day of sale. This fact points the difference between the case at bar and that of *McMahan v. American Building & Loan, etc., Ass'n*, 75 Miss. 965, 23 So. 431. The construction contended for by appellants would upset most of the foreclosures heretofore had in Mississippi, and impose a harder rule for advertising a sale in a daily newspaper than for an advertisement in a weekly newspaper. The statute makes simple that which might otherwise be involved and obscured by legal refinement.

*Affirmed.*

## CURRIE ET AL. v. ULMER.

[76 south. 877, Division B.]

**EVIDENCE. Documentary evidence. Certified copies. Admissability.**

Under sections 1956 and 1974, Code 1906, providing that the record of any writing permitted to be recorded, or a copy thereof, when certified by the clerk, shall be received in evidence without accounting for the original, but if the execution be disputed, the original shall be produced, or its absence accounted for, before the certified copy shall be received in evidence, and that in suits founded on any written instrument it shall not be necessary to prove the signature or execution thereof, unless the same be specifically denied by verified pleas, where complainants denied under oath the execution of the deed under which defendant claimed it was improper to admit over complainant's objection a certified copy in evidence without any foundation therefor being laid.

APPEAL from the chancery court of Jasper county.

HON. G. C. TANN, Chancellor.

Bill by C. Currie and others against H. Ulmer. From a decree dismissing complainant's bill, he appeals.

The facts are fully stated in the opinion of the court.

Cook, P. J., delivered the opinion of the court.

The complainants filed in the chancery court of Jasper county their bill of complaint, praying for the partition of certain lands described in the bill of complaint. The bill alleged that complainants were the sole surviving heirs at law of Demaris Ulmer, deceased, who died intestate, and who was the owner of the lands described when she died. Appellee answered the bill, and alleged that he was the owner of the land; the deceased having deeded same to him before her death. To this answer, appellants replied, denying under oath the execution of the deed by Demaris Ulmer.



The evidence offered by complainants supported the allegations of their bill. Defendant offered no evidence, except what purported to be a certified copy of the deed in question. At the close of complainant's case, the record shows, defendant's counsel pulled the certified copy from his pocket and offered it in evidence. Complainants objected to the introduction of the certified copy of the deed, and the court overruled the objection, and followed with a decree dismissing the bill. This was manifest error. See sections 1956 and 1974, Code of 1906.

*Reversed and remanded.*

---

LYNCHBURG SHOE CO. v. CASTLEMAN ET AL.

[76 South. 878, Division B.]

MORTGAGES. *Trust deeds. Foreclosure. Time of sale. Code 1906, sections 2772, 2821-3984.*

Where a trust deed provided that the trustee may take possession of the trust property and sell the same at public outcry after giving legal notice of the time, place and terms of the sale in the county in which the property is situated, it was sufficient that he complied with section 2772, Code 1906, as to notice of the sale, and it was not necessary to hold the sale in accordance with sections 2821 and 3984, which fix the time for sale only when the trust deed itself is silent as to the place and terms of sale and mode of advertising.

APPEAL from the chancery court of Washington county.

HON. E. N. THOMAS, Chancellor.

Suit by the Lynchburg Shoe Company against Pauline Castleman and others. From the judgment rendered, plaintiff appeals.

The facts are fully stated in the opinion of the court.

*Somerville & Somerville, for appellant.*

Section 2821, applies and the sale is void. This section of the Code provides that if the mortgage or trustee deed be silent in its grant of powers, then the powers shall be carried out as if the sale were being conducted by the sheriff.

The section of the Code is quoted here for convenience. If a deed of trust or mortgage, with power of sale, be silent as to the place and terms of the sale and mode of advertising a sale may be made after conditions broken, for cash, upon such notice, and at such time and place as is required for sheriff's sale of like property."

The construction of this section of the Code, we think is conclusive in this case. The date for sheriff's sales is the first Monday in each month, etc., and it is admitted that this sale was had and conducted on a date other than the date set for sheriff's sales, the question therefore is whether this sale should have been on a date for a sheriff's sale.

In the first place we insist that the appellee has practically admitted that this section of the Code applies; the sale was advertised for the time, and in the manner required for a sheriff's sale, section 2872 requiring it anyway; he has gone still farther; he has conducted the sale between the hours of 11 a. m. and 4 p. m. to wit: at noon; he has gone still farther and had the same made for cash, and at the court house door of the county where the land is situated. In short he has wholly and completely complied with section 2821 except in the particular of the date set for the sale.

We insist that the construction placed on this instrument by appellee and by the chancellor does violence to the English language. They contend, and the learned chancellor upheld them in this contention, that for this section of the Code to apply, the instrument had to be absolutely and entirely silent on the subject. Well it is

for this court to say, and we hope the court will say so that the matter will be settled for all time to come; but we most earnestly insist that our grammar does not run that way, and we do not so read the previous rulings of this court.

The construction asked by the appellee is indeed a refinement and if allowed, would construe the law off the statute books if followed to its logical conclusion. Let us inquire as to how a trust might be silent. If it said nothing about the place, terms or method of sale, or the method of advertising, how could or would it contain a power of sale. If the trust deed was absolutely silent on all of these subjects we insist that it would then not even permit a sale; we can hardly picture a trust deed having any power of sale at all that did not have some remote reference to the sale. Under the construction contended for by appellee if it had any remote reference to the place for the sale or the terms of the sale or the method of advertising, then it was not silent. This would be absurdity and would render the statute ridiculous.

This court held, in the case of *Polk v. S. S. Cale & Sons*, 47 So. 386, 93 Miss. 664, that where a trust deed provided for a sale at S. S. Dale's store, that it was silent, and that the section 2821 applied, for this reason to wit; that the store was in a county other than the land and Acts 1896, p. 109, ch. 103, provided that the land had to be sold in the county where the land was situated. The effect was that the law struck out of the trust deed the place, and it was therefore under the opinion of this court silent in this respect. The trust deed being in this attitude, the court said that this section we quote should have applied and that the instrument should be foreclosed in accordance with the statute. The trust deed specified all of the items referred to by the statute, and was only rendered silent because the statute struck out a part of the trust deed. The court holds that section 2484, Code 1892, which is 2821 of the Code of 1906, applies to the trust deed.

It will be noted that the court also holds in this case that if the trust deed is silent as to any of the three particulars in question that then section 2821 of the Code applies. This is the necessary decision in that case for the trust deed covered everything save for the fact that the place was an impossible place.

The court then seems to hold that the section does not apply, citing a Texas case, in so far as the valid provisions of the trust deed, apply and winds up with the assertion that the appellee is bound by the decision of the lower court which would render the matter uncertain. This is unsequential in the case at bar however for if section 2821 applies at all in this case, it applies as to the time for sale.

The appellee does not dispute the above propositions, but seeks to validate the sales on the dates in question by saying that the power and authority is vested in the trustee in this case to determine what date he may want for the sale of the property, what terms he will sell on and what place he will select for the sale of the property. This is under the former decisions of this court, all of which are easily distinguishable. We note them before proceeding further. *Goodman v. Durant Bldg. & Loan Assn.*

The trust deed provided that the trustee should "advertise said property for sale, naming the time, place and terms of sale." Judge CAMPBELL very properly says that "empowering one to name time, place and terms is just as if the time place and terms were inserted in the instrument," 71 Miss. 310. *Williams v. Dreyfus*, 79 Miss. 249.

The trust deed provided that the sale should be made after thirty days' notice had been given by posting notices, etc., and that the property should be sold for cash at public outcry, at Jackson or any suitable place. The court held that this was not silent for it specified everything but the place, and said Jackson, or any other suitable place which by necessary implication meant a

place to be selected by the trustee if Jackson did not suit him.

The only other place in the records of this court where this statute is referred to is in the case of *Davis v. O'Connell*, but that case is not an authority in the matter for the briefs of counsel in the case show the question was not presented by them, and the record does not show the provision of the trust deed.

It will be observed that this court has never said what will be silence and what will not in the contemplation of section 2821.

If the trust deed in this case gives the trustee power to name his place of sale, then the trust deed in the case of *Polk v. Dale*, did, for they each have the identical clause of giving notice of the time, place and terms of sale. The court in the *Polk v. Dale* case decided that this amounts to nothing; we ask the court to hold that it means nothing in this instance. The only difference is that in this instance the trust deed says legal. In the case of *Polk v. Dale*, the trust deed then, after specifying the above went on, and not being silent said that notice should be for ten days, posted in three places, and that the property should be sold for cash. We insist that a close examination of the *Polk v. Dale* case, shows it to be conclusive of this case.

Boiled down to its last analysis this matter is simply a construction of this language in the trust deed. This like many other things is susceptible of two constructions, varying with the way the question is presented. It might be good for some purposes but mean another thing for others. We ask the court to construe the power of the trustee strictly, and we make this request advisedly. This court has decided in numberless cases that the power and authority conferred upon a trustee, and the execution of the same is strictly construed in favor of the mortgagor or owner of the land; in this instance his assigns. *Allen v. Alliance Trust Co.*, 84 Miss. 330; *McCaughan v. Young*, 85 Miss. 289.

See brief of Percy & Campbell, page 325 of 84 Miss. We feel sure that Campbell & Cashin will adhere to the same law that the same R. B. Campbell laid down there. *Wilczinski v. Watson*, 69 So. 1009, 110 Miss. 86; *Ry. Co. v. Hunter*, 70 Miss. 471; *Bowman v. Roberts*, 58 Miss. 126.

*Campbell & Cashin*, for appellee.

The second question presented. which is not covered by the briefs in the two companion cases above referred to, is that the trustee, in making this sale, was required to make the same in accordance with the provisions of sections 2821 and 3984 of the Code. In other words, the argument of appellant is that the trust deed, under which one of the foreclosures involved in this case was made, is silent as to the place and terms of the sale and the mode of advertising the same, and that, therefore, the place and terms of sale and the mode of advertising are governed by sections 2821 and 3984 of the Code.

The provisions of the trust deed in question, as appears on page 29 of the transcript, is as follows: "The trustee herein may take possession of said property and sell the same at public outcry, after giving legal notice of the time, place and terms of the sale in the county in which the property is located." We respectfully submit that this trust deed is not silent as to the place and terms of the sale and the mode of advertising the sale, but that the trust deed vests the trustee with discretion to fix the time, place and terms. Therefore, section 2821 does not apply. *Goodman v. Durant Bldg. & Loan Ass'n*, 71 Miss. 310. The only legal notice that can be given of the time, place and terms of a sale of land under a mortgage with power of sale, or trust deed, is fixed by section 2772 of the Code, and, by virtue of said section, no sale of lands under deed of trust or mortgage with power of sale shall be valid unless such sale shall have been advertised as

provided for therein, regardless of any contract to the contrary.

Therefore, while this trust deed vested the trustee with authority to sell the property conveyed therein at public outcry, after "giving legal notice of the time, place and terms of the sale," all of which is fixed by the statute, section 2821 of the Code could not apply, because the trust deed is not silent as to the place and terms of sale, and the mode of advertising the same. The trustee is authorized to fix that, and he must fix it, as prescribed by section 2772.

We might add that if section 2821 did apply, and the sale had to be made as prescribed by section 3984, as directed by section 2821, then the note would be void, because in conflict with section 2772, section 3984 is as follows: "Sales of land may be made on the first Monday of every month, or on the first Monday or Tuesday of a term of the circuit court of the country, and shall be advertised in a newspaper published in the county, once in each week for three successive weeks."

It will be noticed that section 2772 of the Code provides as follows: "Sale of said lands shall be advertised for three consecutive weeks preceding such sale, in a newspaper published in the county, or if none is so published, in some paper having a general circulation therein, and by posting one notice at the court house of the county where the land is situated, for said time. No sale of lands under a deed of trust or mortgage shall be valid unless it has been advertised as herein provided for, regardless of any contract to the contrary."

The court will observe that, by section 3984, the sheriff is not required to post a notice at the court house door, but is only required to advertise in a newspaper published in the county once each week for three successive weeks.

The court will remember that in *Wilszinski v. Watson*, 69 So. 1009, 110 Miss. 86, it was intimated by Judge

SMITH that the method to be pursued in selling lands under deeds of trust is not subject to regulation by contract, because it is a judgment, Section 2772 of the Code as amended by chapter 190 of the Laws of 1908, prescribes and exclusive method for such sales. Both the majority and the dissenting opinion in that case is clear law to the effect that any sale not advertised in accordance with the provision of section 2772 is void. Therefore, if section 2821, and its correlative section 3984, as applied to the method of advertisement, were pursued in this case, the sale would be void, because no notice of sale is required by section 3984 to be posted at the court house.

We do not deem it necessary to answer the argument advanced by counsel for appellant in the reply briefs in the case of *Lake, Trustee v. Castleman*, for the reason that it was clearly explained to the court and conceded by counsel for appellant that section 1608 of the Code destroyed the force and effect of their argument in reference to the advertisement being continuous, that is to say, every day, if made in a daily newspaper.

We respectfully submit that the decree of the learned chancellor below in this and the two companion cases above mentioned were correct, and should be affirmed.

STEVENS, J., delivered the opinion of the court.

One point presented on this appeal—that is, the sufficiency of the publication of the notice of the trustee's sale under which appellees claim title—is controlled and disposed of by the opinion in the companion case of *J. Albert Lake et al. v. Pauline Castleman*, 76 So. 877, No. 19796. The issue in this case was presented by a bill of complaint exhibited by appellant, the Lynchburg Shoe Company, against appellees, Pauline Castleman, Solomon and Frieda Davidow, N. W. Sumrall, and others, to set aside the foreclosure of a deed of trust under which appellee Mrs. Castleman claims. The



bill charges fraud and collusion against appellees, Mrs. Castleman and N. W. Sumrall, trustee. The additional point made in this case is the contention that the trust deed was silent as to the time, place, and terms of sale, and, being silent, section 2821, Code of 1906, applies, and by virtue of the provisions of section 2821, the sale should have been made on the first Monday of a month, or at least on the Monday or Tuesday of a term of court, as provided by section 3984, Code of 1906. The provision of the trust deed in question reads:

"The trustee herein may take possession of said property and sell the same at public outcry, after giving legal notice of the time, place, and terms of the sale in the county in which the property is located."

It is the contention of appellant that under this provision the trust deed is silent as to the place and terms of sale and mode of advertising, and that the sale here attacked, having been made on the last day of the month; instead of the first Monday, is void. The chancellor dismissed the bill, and accordingly decided against appellant on the facts.

The alleged fraud in this case was not proved and the decree of the learned chancery court cannot be reversed on that ground. In foreclosing, the trustee fully complied with section 2772, Code of 1906, so far as the provisions of that section are applicable. If we follow the decision of our court in *Goodman v. Durant B. & Loan Ass'n*, 71 Miss. 310, 14 So. 146, the trustee in this case was empowered to fix the time for the sale. The trust deed is not silent as to the place and terms of sale and mode of advertising. Since the enactment of section 2772, the trustee must of course comply with this statute providing how land should be sold under mortgages and deeds in trust. It is not contended that he failed to comply with this section, and, having the delegated power to name the time for the sale, there is no infirmity in appellees' title.

*Affirmed.*

## GAVIN ET AL v. GAVIN ET AL.

[76 South. 879, Division B.]

1. PARTITION. *Pleading. Sufficiency. Code 1906, section 1649.*

Under Code 1906, section 1649, providing that land shall descend to children and wife in equal parts, where a bill for partition alleged that all the parties were children of the deceased owner except one who was the wife of deceased, that the land was not a homestead nor exempt, that defendants, the wife and a part of the children, refused to let plaintiff enter and occupy the lands, such a bill was not subject to the demurrer of the wife and other defendants on the grounds that there was no equity in the bill, and that it showed on its face that the wife was entitled to the use of the lands mentioned in the bill as a homestead during her widowhood.

2. PARTITION. *Accounting. Trust.*

Even though a bill attempted to partition exempt land without the widow's consent, a demurrer to it should not be sustained and the bill dismissed where it also asked for an accounting for timber cut by the widow.

3. APPEAL AND ERROR. *Matters reviewable. Matters not of record.*

The supreme court on appeal can only decide the case presented by the record.

APPEAL from the chancery court of Noxubee county.

HON. A. Y. WOODWARD, Chancellor.

Bill by Nicholas Gavin and others against Rosa Gavin and others for partition and accounting.

From a decree for defendants, plaintiff appeals.

The facts are fully stated in the opinion of the court.

*Geo. Richardson and Green & Green, for appellant.*

Counsel contends that this proceeding is merely to obtain the use and benefit of the homestead. However, the demurrer expressly admits the allegation of the bill which sets forth that the timber had been removed

and in so doing "has denuded said lands, of their greatest asset in the sale of said timber, which timber was the most valuable on said land."

Now in *McKenzie v. Shows*, 70 Miss. 390, it was expressly held that: "The growing trees are a part of the realty, and may be, in case the lands are what are denominated timber lands in contradistinction to other lands called agricultural lands, a very valuable part of the realty. In a readily supposable case, the sale and removal of the entire forest growth would practically destroy the value of the realty. In the case at bar it is alleged in the bill, and not denied in the answer, that the lands in question would be only worth about one-half as much as they are, if the timber should be taken off."

Hence by this direct decision, if the said James Gavin had no power, without Rosa's consent, to denude the homestead of this timber and thus convert a part of the homestead to his own use, it goes without saying that those who are tenants in common, and who, at most have but the right to object to a partition could not do that which the owner in fee could not have done. This case of *McKenzie v. Shows* is conclusive.

We deny that the sole question in this case is the right to enjoy the land "free from rent or hire and from partition during her widowhood."

The contention turns chiefly upon the destruction of the timber and the impairment of the rights as set forth in the original brief.

We respectfully submit that admitting the right of the widow to make a selection under chapter 216 of the Laws of 1912, that no selection has been made in conformity therewith, because when such selection is made where the husband leaves a widow and children, such selection must be the joint selection of widow and children and not the selection of the widow alone.

In order to determine the rights under section 1659 and to make a selection thereunder, the property must have descended in accordance therewith.

In the case at bar we asked for a decree against the widow for property which she has already destroyed and converted. With deference, we submit that the accounting herein should be granted and the relief given, especially as the appellee, Rosa Gavin, has no right to do other than keep the property from being partitioned, which does not vest in her the power to divide it so as to take part of it and appropriate it to her own use and benefit, and let the other go.

*Strong & Bush*, for appellee.

The sole question to be decided in this case is whether or not the widow, Rosa Gavin, is entitled to the use and occupation of this land in question free from rent or hire and from partition during her widowhood, although her husband, Jas. Gavin, did not reside on this land at the time of his death. It is true that for the sake of the demurrer every material allegation in the bill filed in this cause had to be admitted, but regardless of these admissions about the shotgun proceedings and the wholesale cutting of timber, which allegation makes it look like this woman is a holy terror, still this whole proceeding, as shown by the pleadings, is purely and simply an attempt to partition this land by having a sale of the same and thereby defeating the very part of a law made for the welfare of a family of this kind where there are a great number of children by a former wife scattered in every direction and another set of children by the present widow who are minors and dependent upon their mother for support.

Section 1659 of the Code of 1906, is in the following words: "Exempt property not to be partitioned in certain cases." "Where a decedent leaves a widow to whom

with others, his exempt property, real and personal, descends, the same shall not be subject to partition or sale for partition during her widowhood as long as it is occupied or used by the widow, unless she consents."

Under chapter 216 of the Laws of 1912, provides for the selection of property by the widow in case a homestead has not been designated by the deceased husband during his lifetime, and it will be noted that in this act of the legislature the widow has a right to designate the property as the homestead of the decedent and not as a homestead of his widow and children, and the very purpose of this law was to give the widow and her family every right given under section 1659 of the Code of 1906, and keep down any confusion with other sections of the statute relative to exempt property.

In this case it was not essential for the widow Rosa Gavin, or other heirs at law, to make a homestead declaration for the reason that there was no other property to select from, but the chapter 216 of the Laws of 1912, is of more benefit in case the decedent dies seized of more than one hundred and sixty acres of land no homestead had ever been made in order to apprise the creditors of what land they might expect to issue execution on or apply to their debts, and certainly in the latter case if homestead is made by the widow she automatically derives the benefit and protection under section 1659 of the Code of 1906, that being the case, how in reason can there be any difference in the rights given the widow with a whole lot of land and where she has only a little piece of one hundred and twenty acres.

We have examined the whole history of the legislation in this state on the subject, Acts of 1839, 1846, 1852, 1860, 1865, and the Code, and all of the decisions on any and all of them, and have reached a conclusion now to be stated, and which is generally foreshadowed in *Middleton v. Claughton*, 77 Miss. 135, though it did not present the question we now have before us. However, it distinctly recognized it as a separate question.

"Section 1551, Code of 1892, which is the same as section 1277, Code of 1880 (Code of 1906-1657.), provided that the property, real and personal, exempted by law from sale under execution or attachment, shall, on the death of the husband or wife owning it, descend to the survivor of them and the children of the decedent, as tenants in common.

Section, 1553, of the Code of 1892 (section 1659 of Code of 1906) is this: "Where a decedent leaves a widow to whom, with others, his exempt property, real and personal, descends, the same shall not be subject to a partition of sale for partition during her widowhood, so long as it is occupied or used by the widow, unless by her consent." *Stephens v. Wilbourn*, 84 Miss. 514. Judge CALHOUN says, we adhere to the decisions in *Martin v. Martin*, 84 Miss. 533, and it carries the case.

The chancellor was right in overruling the motion of appellant to dissolve the injunction granted on the cross-bill of appellee on the pleadings and agreed evidence. So much we say on the point of the right of the widow to the undisturbed possession of the homestead.

Our court goes so far as to say in *Tally v. Tally*, 108 Miss. 84, that a decree in partition ordering and confirming a sale of homestead rights to which the widow objects to be vacated and the bill dismissed.

With confidence we think that it would be an imposition on this court to cite all of the law in cases of this kind.

We further think that if the court should hold that this land could not be partitioned, that under the bill filed, complainants could not ask the widow for an accounting for any waste. The bill would be multifarious.

ETHRIDGE, J., delivered the opinion of the court.

Appellants filed their bill in the chancery court, alleging that James Gavin departed this life intestate

about the 18th day of August, 1915, and left surviving him the complainants and the defendants as his heirs at law, the defendant Rosa Gavin being his wife, and the others being children, four of the children being children of the deceased and Rosa Gavin, and the others being children of a former marriage. It is alleged that the decedent died seised and possessed in fee simple of certain lands described in the bill. It was further alleged that at the time of the death of James Gavin no part of the land described in the bill constituted a homestead of the said Gavin, deceased, and that he had never resided upon the lands, nor improved the same as a homestead. It is further alleged that Rosa Gavin entered upon the lands in question subsequent to the death of James Gavin and was claiming the right to use them; that she had cut from the lands timber growing thereon, or the principal part thereof, and converted the same to her own use; and that she had forbidden the complainants from entering upon or exercising any control or ownership over the land. It was also alleged that Rosa Gavin cut about three hundred trees from the said land, and that she would not permit the complainants to go upon the land for the purpose of determining the number of trees cut. The bill further alleged that it was impracticable to carve out fifteen interests in the said lands, and prayed for a partition of said lands, or a sale for partition, and for an accounting by Rosa Gavin of the timber cut, and that she be charged therewith and the charge made a lien on her interests in the said property, and alleging that the timber cut and sold by Rosa Gavin was worth more than her interest in the property. The bill was demurred to by the defendants, on the grounds that there was no equity in the bill, and that it showed on its face that Rosa Gavin was entitled to the use of the said land mentioned in the bill as a homestead during her widowhood. The demurrer was sustained by the chan-

cellor, and an appeal taken. In the decree allowing the appeal it was recited that:

“Counsel agree that only the bill as amended, the demurrer, and the decree need be sent to the supreme court.”

It appearing from the bill that all the parties were children of the decedent except Rosa Gavin, and she was his wife, and it being alleged that she refused to let them enter upon and occupy the lands, and it being further alleged that the decedent had never occupied the lands as a homestead, we think the chancellor was in error in sustaining the demurrer to the bill. Section 1649, Code of 1906, provides for the descent of land other than exempt lands, and provides that it shall descend to the children and wife in equal parts. Section 2146 provides for the exemption of homesteads in the country, and provides that the lands and buildings owned and occupied as a residence by the owner shall be exempt, not to exceed one hundred and sixty acres in quantity and over three thousand dollars in value. Section 1657 of the Code provides for the descent of exempt property, providing that it shall descend to the children and wife, and under this section each has an equal interest and right in the homestead. Section 1659 provides that, where the decedent leaves a widow to whom with others his exempt property, both real and personal, descends, the same shall not be subject to partition or sale for partition during her widowhood so long as it is occupied or used by the widow, unless she consents.

Among the allegations of the bill it was alleged that the property was not exempt property of the decedent, and the demurrer admits this; but, even if this was not true, the bill should have been retained, and an accounting of the timber cut and sold required. The appellees in their brief refer to a homestead declaration filed by the widow subsequent to the death of James Gavin, deceased, selecting the lands in question as a homestead



under the provisions of chapter 216, Laws of 1912. The record, however, does not contain any such declaration, and as we can only decide the case presented by the record, we do not decide what effect, if any, such declaration would have upon the suit.

The cause is reversed and remanded.

*Reversed and remanded.*

---

POSTAL TELEGRAPH & CABLE CO. v. ROBERTSON, STATE  
REVENUE AGENT.

[76 South. 560, Division B.]

1. CONSTITUTIONAL LAW. *Validity of act. Burden of proof.*

If the question of whether or not there was a publication of Laws 1902, chapter 80, with reference to the levy of privilege taxes by the levee commissioners, as required by Constitution 1890, section 234, is entertainable in the courts, it would require the party attacking the law to prove such fact by sufficient evidence. The burden of proof would be on the party alleging there was no publication to prove this fact beyond reasonable doubt or by clear and convincing testimony.

2. CONSTITUTIONAL LAW. *Passage of act. Compliance with constitution. Presumption.*

Where the legislature passes a bill, it will be presumed that it observed all constitutional requirements and did its full duty until the presumption is overcome by clear and convincing testimony.

3. LEVEES. *Privilege taxes. Power of legislature.*

It is too late now to question the power of the legislature to create taxing districts and confer on such taxing districts or municipal corporations, the power of taxation, section 237 of the Constitution in dealing with this specific question confers full power upon the legislature to provide such system of taxation for said levee district as the legislature shall from time to time deem wise and proper. The legislature has full power to impose a privilege tax, or to authorize the levee commissioners to do so.

## 4. SAME.

The provisions of section 112 of the Constitution do not require the taxing body to levy privilege taxes according to the requirements of that section.

5. TAXATION. *Uniformity. Privilege tax.*

The Constitution does not require that a municipal corporation, or taxing district, authorized by law to levy and collect privilege taxes shall require all privileges to be taxed that are authorized; nor that they shall be taxed in the same proportion to the maximum named in the statute, but so long as all persons exercising any particular privileges are taxed alike, under the same circumstances no constitutional principle is violated.

6. LEVEES. *Tax by commissioner. Notice.*

Under the Act of 1902, chapter 80, authorizing the levee commissioner to impose a privilege tax in said district by an order entered upon its minutes, it was not required that the order levying privilege taxes should be published in a newspaper or otherwise, except that a copy of the order should be sent to the sheriffs of the several counties of the levee district. It did not require the levee board to give notice to persons or corporations desiring to exercise privileges in the district, nor was it necessary for the board to give such notice in order to make the ordinance valid, all persons being charged with notice under the statute, of the power of the board to levy privilege taxes upon occupations, privileges and businesses.

APPEAL from the circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Suit by Stokes V. Robertson, State Revenue Agent, against the Postal Telegraph & Cable Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*Mayes & Mayes*, for appellant.

*Flowers, Brown, Chambers & Cooper*, for appellee.

ETHRIDGE. J., delivered the opinion of the court.

The state revenue agent brought suit against the Postal Telegraph-Cable company for privilege taxes due for the years 1904 to 1915, inclusive, to the Yazoo-

Mississippi Delta levee-district; said privilege taxes being levied by the said levee district under chapter 80 of the Laws of 1902. The board of levee commissioners, acting under chapter 80 of the Laws of 1902, in the year 1904 imposed a privilege tax upon telegraph companies, operating less than one thousand miles of line, of twenty five cents for each mile. This act was passed by the May session, 1904, of said board of levee commissioners and imposed a privilege tax effective July 1, 1904. Other privilege taxes were imposed at different dates set out in the pleadings up to 1912, but the amount of privilege taxes on telegraph companies was not changed. Three hundred and sixty miles of telegraph line were operated in this district by the Postal Telegraph-Cable Company during each of the said years 1904 to 1915, both years inclusive; the mileage of different counties being set out in the declaration. The privilege taxes for each year amounted to ninety dollars, and the statute providing a penalty of ten per cent. of the amount for nonpayment. Suit was brought for ninety-nine dollars for each of the said years, amounting to one thousand one hundred and eighty eight dollars. Interrogatories were propounded under the statute to the telegraph company, a nonresident of the state, and its answers show that it did do business within the district for each of the said years, and that the total mileage it operated in the district was 359.07 miles. The telegraph company filed several special pleas as a defense to the suit.

Special plea No. 1 alleges that chapter 80 of the Laws of 1902 is null and void because the act is alleged not to have been published four weeks prior to the introduction of the act in the legislature, as required by section 234 of the state Constitution.

The second special plea alleges that the power to tax by the act of 1902 was conferred on the board of levee commissioners of the Yazoo-Mississippi Delta, and that there is no such levee commission authorized by

the law; that the Constitution creates a board of levee commissioners for the Yazoo-Mississippi Delta levee district; and that the act of the board is void because chapter 80 of the Laws of 1902 does not confer authority on the commissioners of Yazoo-Mississippi Delta levee district.

The third special plea is that the act of 1902 is void because it authorizes a privilege tax to be levied without regard to the benefits derived by any property, business, or avocation, and that the law authorizes the board to act without any guide or direction, and only fixes the maximum of each privilege tax; and that the act does not require all privileges to be taxed, nor that they shall be taxed uniformly or to the maximum authorized, but that the tax on one privilege might be the full value authorized by the Laws of 1902, chapter 80, and tax of another privilege one-half of the maximum authorized by the said law; and that the act intended to invest the board with absolute and arbitrary power, and that by reason thereof the act violates section 112 of the State Constitution and section 1 of the Fourteenth Amendment to the Constitution of the United States.

The fourth special plea alleges that the proceedings to impose privilege taxes is void and unconstitutional, and that sections 1 and 2 of the act of 1902 undertake to authorize the commissioners to determine for themselves what taxes will be levied and what amount within the maximum fixed by law, only by an order entered on the minutes of the board, and there is no requirement for any publication of such order so entered, and no requirement of any notice to be given persons exercising the privilege to be taxed, and that the telegraph company was never in fact notified of the passage of such ordinance until 1916 when demand was made upon it by the state revenue agent; and that the ordinance, if given effect, would be taking the property of the defendant without due process of law and without

the equal protection of the law under the Fourteenth Amendment.

The first plea was replied to and the allegation that notice was not published prior to the introduction of the bill in the legislature creating chapter 80 of the Laws of 1902 was denied and the other pleas were demurred to, the demurrers sustained, and defendants, declining to plead further, judgment was entered in favor of the revenue agent.

A person was sent to Clarksdale in 1916 to investigate as to the publication of chapter 80 of the Laws of 1902, but no file of the paper, or any paper, published at Clarksdale, the domicile of the levee board, for the years 1901 and 1902 could be found. No file of the paper or issue of any paper during the years 1901 and 1902 was found in said city. It was shown that one paper had gone out of business long since, and no files could be found of that paper during this period of time. It is contended by the appellant that the state revenue agent must show publication of this notice as a condition of his right of recovery. The revenue agent contends that the burden of proof as to such publication is upon the appellant to show that there was not a publication; and, second, contends that the legislature having passed the bill, the court would have no power to go behind the enrolled bill and determine the questions of fact bearing on such publication. Section 234 of the Constitution reads as follows:

“No bill changing the boundaries of the district, or affecting the taxation or revenue of the Yazoo-Mississippi Delta levee district, or the Mississippi levee district, shall be considered by the legislature unless said bill shall have been published in some newspaper in the county in which is situated the domicile of the board of levee commissioners of the levee district to be affected thereby, for four weeks prior to the introduction thereof into the legislature; and no such bill shall be

considered for final passage by either the Senate or House of Representatives, unless the same shall have been referred to, and reported on, by an appropriate committee of each house in which the same may be pending; and no such committee shall consider or report on any such bill unless publication thereof shall have been made as aforesaid."

There is no legal proof in the record that proper publication was not made. If the question of whether there was a publication is entertainable in the courts, it would require the party attacking the law to prove such fact by sufficient evidence. The burden of proof would be upon the party alleging there was no publication to prove this fact beyond reasonable doubt or by clear and convincing testimony. The journals of the legislature show that the Governor in submitting the question to the legislature recited in his message that publication of the proposed act had been duly made. The legislature passed the bill, and it will be presumed that it observed all constitutional requirements, and it will be presumed that it did its full duty until the presumption is overcome by clear and convincing testimony. We think the court was correct in sustaining the demurrer to the second, third, and fourth special pleas of the bill.

It is too late now to question the power of the legislature to create taxing districts and confer on such taxing districts, or municipal corporations, and the power of taxation. Section 237 of the Constitution in dealing with this specific question confers full power upon the legislature to provide such system of taxation for said levee district as the legislature shall from time to time deem wise and proper. The legislature had full power to impose a privilege tax, or to authorize the levee commissioners to impose a privilege tax, and it is immaterial whether the legislature did this itself or whether it conferred the power upon a subordinate administra-

tive body. It has been repeatedly held in this state that the provisions of section 112 of the Constitution do not require the taxing body to levy privilege taxes according to the requirements of that section. 25 Cyc. 605, clause "h"; *Coca Cola Co. v. Skillman, Tax Collector*, 91 Miss. 677, 44 So. 985; *Clarksdale Ins. Agency v. Cole Ins. Con'r* 87 Miss. 637, 40 So. 228; *Cudahy Packing Co. v. Stovall, Treas.*, 112 Miss. 106, 72 So. 870.

Neither does the Constitution require that a municipal corporation, or taxing district, authorized by law to levy and collect privilege taxes shall require all privileges to be taxed that are authorized; nor that they shall be taxed in the same proportion to the maximum named in the statute, but so long as all persons exercising any particular privilege are taxed alike, under the same circumstances no constitutional principle is violated. In *Holberg v. Town of Macon*, 55 Miss. 112, the court held that a privilege tax levied by a municipal corporation which is the same on all persons pursuing the same profession or occupation and not exceeding the amount authorized by statute is not violative of the provision of the Constitution requiring that taxation shall be equal and uniform throughout the state, and that the fact that some professions and trades taxed by the state are not taxed by the municipal corporation does not affect the validity of the tax on the others. See, also, *Vicksburg Bank v. Worrell*, 67 Miss. 47, 7 So. 219; *Daily I. Swope*, 47 Miss. 367.

The act of 1902 authorizes the levee commissioners to impose a privilege tax in said district by an order entered upon its minutes. It did not require this order levying privilege taxes to be published in a newspaper or otherwise except that a copy of the order should be sent to the sheriffs of the several counties of the levee district. It did not require the levee board to give notice to persons and corporations desiring to exercise privilege in the district, nor was it necessary for the board to give such notice in order to make the ordinance valid.

All persons are charged with notice under the statute of the power of this board to levy privilege taxes upon occupations, privileges, and businesses, and any person desiring to pursue any business or occupation in said district was under the duty to ascertain whether such privilege tax had been levied, and the amount thereof, and pay it before doing the business so taxed. The minutes of the board of levee commissioners are public records subject to inspection, and the company cannot complain if it failed to make an inquiry which would have disclosed the amount of tax it was under obligation to pay. It appears that notice was sent to the sheriffs of the several counties as required by the act of the legislature, and it is not shown nor alleged that the defendant applied for the privilege or sought advice or information at the sources pointed out in the statute. The court below having reached conclusions in accordance with this opinion, the judgment is affirmed.

*Affirmed.*

## EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN v. WICKER.

[76 South. 634, Division A.]

1. **INSURANCE. *Mutual benefit insurance. By-laws as part of contract.***

Under a mutual benefit insurance policy so providing, the insured is bound by a by-law of the society adopted subsequent to the issuance of his policy, requiring an X-ray photograph to be furnished the society as a part of the proof of a disability covered by the policy, and the fact that members of his family were so ill during the time his arm was broken that he could not leave long enough to have such a photograph taken would not relieve him from his obligation to comply with this by-law.

2. **MUTUAL BENEFIT INSURANCE. *Defenses. Condition precedent. Statute.***

Where a mutual benefit insurance policy is a dual one covering both life and physical disabilities, in so far as it is a disability



policy it does not come within the terms of section 2636, Code, 1906, so that the failure of the insurer to file a copy of a by-law, requiring an X-ray photograph as part of the proofs of disability in case of a broken arm did not prevent the insurer from setting up the defense that such photograph was not furnished.

APPEAL from the circuit court of Winston county.

HON. H. H. RODGERS, Judge.

Suit by Chas. W. Wicker against the Eminent Household of Columbian Woodmen. From a judgment for plaintiff, defendant appeals.

The appellee, through accident, suffered a broken arm. At the time of this injury he carried a policy in the appellant company, which stipulated that in event of a broken arm the company would pay him two hundred dollars. The policy also provided for the payment of two thousand dollars in case of death. One of the stipulations in the policy was as follows:

"In event of broken arm or leg after this covenant has accumulated its full denomination, this guest shall receive two hundred dollars, or at an earlier date, the same percentage of value of the covenant as this sum would be of its full accumulative denomination."

The appellee made an effort to comply with this stipulation, but never did have an X-ray photograph made of the fracture and furnished to the appellant. His demand for payment of the sum of two hundred dollars being refused, he instituted suit. There was a peremptory instruction for the appellee, and from a judgment in his favor this appeal is prosecuted.

On appeal it is urged that it is not affirmatively shown that a copy of the by-laws of the company was filed with the insurance commissioner, as required by section 2636, Code of 1906, which is as follows:

"Charter, By-Laws, Rules, to be Filed with Commissioner.—Every corporation, company, society, organization or association of this or of any other state or country, transacting business of life insurance upon the co-operative or assessment plan, shall file with the com-

missioner of insurance and banking, before commencing to do business in this state, a copy of its charter or articles of association, as well as the by-laws, rules or regulations referred to in its policies or certificates, and made a part of said contract. That no by-laws or regulations, unless so filed with the commissioner, shall operate to avoid or affect any policy or certificate issued by such company or association."

*L. Brame* and *J. A. Teat*, for appellant.

*Flowers, Brown, Chambers & Cooper*, for appellee.

SMITH, C. J., delivered the opinion of the court.

Appellee's contract so providing, he is bound by appellant's by-law adopted subsequent to the issuance of his policy, requiring an X-ray photograph to be furnished appellant as a part of the proof of a disability covered by the policy, and the fact that members of his family were so ill during the time his arm was broken that he could not leave long enough to have such a photograph taken did not relieve him from his obligation to comply with this by-law.

The policy here sued on is a dual one, covering both life and physical disabilities, and in so far as it is a disability policy, it does not come within the terms of section 2636, Code of 1906, so that the failure of appellant to file a copy of this by-law with the commissioner of insurance is not here material.

The court below should have granted the peremptory instruction requested by appellant, and not the one requested by appellee. Reversed, and judgment here for appellant.

*Reversed.*

VICKSBURG LODGE NO. 26 ET AL. v. GRAND LODGE OF FREE  
AND ACCEPTED MASONS OF MISSISSIPPI.

[76 South. 672, Division B.]

1. BENEFICIAL ASSOCIATIONS. *Rights of subordinate lodges.*

Where in the by-laws of a Grand Lodge there was a provision that whenever a lodge shall become extinct, its property shall escheat to the Grand Lodge, and the same shall be sold and the proceeds applied to the payment of the lodge debts, and any residue credited to the grand lodge charity fund, such a provision is a regulation and not a contract between the grand and subordinate lodges, and will be construed most strongly against the Grand Lodge which enacted it and most favorably to the subordinate lodge and will not be construed to mean that the Grand Lodge can arrest or forfeit the charter of a subordinate lodge and by such act acquire the property belonging to such lodge.

2. SAME.

The meaning of such a provision is that if from the negligence of the members of the subordinate lodge it ceases to exist or if for any reason they voluntarily surrender their charter and go out of business only in such case will the title to their property be vested in the Grand Lodge as a trustee for the purpose of paying the debts of the defunct lodge and devoting the remainder to the purpose of masonic charity.

3. BENEFICIAL ASSOCIATIONS. *Unconsonable rules.*

Equity will not lend its aid in enforcing a forfeiture of the charter of a local lodge for some contumacy or misconduct of a subordinate lodge.

4. BENEFICIAL ASSOCIATIONS. *Lodges. Power of subordinate lodge.*

A local lodge of the Grand Masonic Lodge which had become incorporated by the statute of the state empowering it to acquire and hold property, and giving it perpetual succession, cannot be deprived of its property by a revocation of its lodge charter by the Grand Lodge, which is without power to destroy a local lodge as a corporation of the state.

5. BENEFICIAL ASSOCIATIONS. *Lodges. Forfeiture of charter. Presumptions.*

As under the laws of the land every person and corporation is entitled to resort to the courts, for redress of any grievance affect-

ing reputation and property under section 24 of the Constitution of the state and as under section 25 of the Constitution no person can be debarred from prosecuting and defending in any civil cause, and as under section 14 of the state Constitution, and the fourteenth amendment to the Federal Constitution no person can be deprived of life, liberty or property without due process of law, the court is bound to assume, in the absence of specific allegations and proof to the contrary that the grand lodge in forfeiting a charter of a subordinate lodge acted in accordance with its rules and proceeded from adequate cause.

APPEAL from the chancery court of Warren county.

HON J. G. MCGOWEN, chancellor.

Bill by Grand Lodge of Free and Accepted Masons of Mississippi against Vicksburg Lodge No. 26 and others. From the decree rendered, the defendant appeals.

The Grand Lodge of Free and Accepted Masons of Mississippi, a body incorporated under the laws of the state of Mississippi, W. H. Stevens Lodge, No. 121, of Free and Accepted Masons, Vicksburg Chapter, No. 3, of Royal Arch Masons, Vicksburg Council, No. 2, of Royal and Select Masters, and Magnolia Commandery, No. 2, Knights Templar, all bodies corporate under the laws of the state of Mississippi, filed a bill in the chancery court of Warren county, Miss., alleging: That said complainants are the true and legal owners of certain real estate in Vicksburg, Miss., being a lot and building thereon used for lodge purposes duly and properly described in the bill. That the said lands were patented by the United States Government to one Newit Vick and passed by a chain of conveyances to Vicksburg Lodge, No. 26, and that said Vicksburg Lodge, No. 26, was a subordinate lodge of the Grand Lodge of Mississippi, and was chartered by the said Grand Lodge in 1836. It is further alleged: That the various Masonic bodies of the city of Vicksburg at the date of the purchase of said lot in 1848 were Vicksburg Lodge, No. 26, Hill City Lodge, No. 121 (now W. H. Stevens Lodge, No. 121), Vicksburg Royal Arch Chapter, No. 3, Vicksburg Council, No. 2, of Royal and Select Masters, and Magnolia Commandery, No. 2,

Knights Templar, and that the said Masonic bodies proceeded to erect on said lot a four-story building for their common use. The first story was designed and intended to be rented for mercantile purposes; the second story to be used for the place of meeting for the various lodges; the third story for the Grand Lodge of Mississippi; and the fourth story for the Magnolia Commandery, No. 2, Knights Templar. That the title to said lot and building was in the various parties named and recognized by all of the bodies as being so vested, and that in the year 1853 a joint offer was made by Hill City Lodge, No. 121, and Vicksburg Lodge, No. 26, to the Grand Lodge of Mississippi, complainant here, of "their hall" for the use of said Grand Lodge, a copy of which offer is attached hereto as Exhibit D to the bill. That in the year 1867 the name of Hill City Lodge, No. 121, was changed to W. H. Stevens Lodge, No. 121, and that the complainants and those under whom they claim went into possession of the property described in the year 1848 and remained in undisturbed possession from said date down to the present time, and that such possession was open, notorious, adverse, peaceful, exclusive, continuous, and uninterrupted for a greater period than ten years, to wit, for sixty years. That afterwards Walnut Hill Lodge, No. 194, and B. Springer Lodge, No. 324, were chartered by the Grand Lodge and used said property jointly with the other Masonic bodies herein mentioned. It is further alleged that the joint possession and use of said lodge continued until 1873, at which time some question had arisen among the various bodies as to property rights in the building, and to settle this question a solemn concordat or agreement was entered into on the 22d day of November, 1873, by and between Vicksburg Lodge, No. 26, W. H. Stevens Lodge, No. 121, Walnut Hill Lodge, No. 194, B. Springer Lodge, No. 324, Vicksburg Royal Arch Chapter, No. 3, Vicksburg Council, No. 2, of Royal and Select Masters, and Magnolia Commandery, No. 2, Knights Templar whereby it was agreed that all the bodies should relin-

quish and did relinquish all claim to the ownership of the said building, and that Vicksburg Lodge, No. 26, should hold title to said property as the trustee for "the Masonic fraternity in general and all Masons of this city (meaning Vicksburg) in particular," and further agreed that the said bodies should prorate amongst themselves the expenses of the upkeeping of the said building, and the rents and profits of the lower floor should be held inviolate as a general relief fund, to be disposed of in accordance with the terms of the concordat. It is further alleged that under the laws of Masonry and rules and regulations of the Grand Lodge of Mississippi that when a charter of a subordinate lodge is arrested or the lodge becomes defunct, the title to the property belonging to the said defunct lodge vests at once in the Grand Lodge of Mississippi, as will appear by section 46 of the rules and regulations adopted by the Grand Lodge of Mississippi for the government of its subordinate lodges, as will appear in the Blue Lodge text-book, which said section 46 reads as follows:

Sec. 46. Whenever a lodge shall become extinct from any cause, its property shall escheat to the Grand Lodge, and the Grand Master shall cause the same to be sold, and the proceeds applied to the payment of the lodge debts, and the residue, if any, shall be credited to the Grand Lodge charity fund: Provided, that any lodge contemplating a surrender of its charter may by vote make any disposal of its property it may see fit, save and except its charter and records, which shall be deposited with the Grand Secretary."

It is further alleged that the B. Springer Lodge and Walnut Hill Lodge had passed out of existence; that Walnut Hill, No. 194, was consolidated with Vicksburg Lodge, No. 26, and that B. Springer Lodge's charter had been arrested by the Grand Lodge. It is then alleged that the Grand Lodge had arrested the charter of Vicksburg Lodge, No. 26, the appellant, in accordance with

the laws of the Grand Lodge of Mississippi on the 10th day of December, 1912, and that its property had passed to the Grand Lodge of Free and Accepted Masons of Mississippi. It is further charged that Vicksburg Lodge, No. 26, has executed a deed of trust on the property which was outstanding. It is then alleged that defendants Housken and Biedenaharn, Jr., have obtained possession of the property, and are claiming and asserting some ownership over the property which casts a cloud, doubt, or suspicion on the title of the claimants of the property, and that said defendants are advertising the building described for rent. The bill prays that Biedenaharn and Housken be made parties defendant, and that a receiver be appointed by the court to take charge of the building and collect all moneys, etc., and that a commissioner to state an account of the rents and profits, and that the claim of defendants be canceled and be held for naught, and that the court will construe the so-called concordat filed as an exhibit to the bill, and that the defendant People's Savings Bank & Loan Company be required to answer the true amount of indebtedness in the deed of trust. Vicksburg Lodge, No. 26, filed a petition to intervene as a defendant, which petition was allowed, and Vicksburg Lodge thereupon filed an answer and cross-appeal to the bill of complaint in which it denies the allegation of the ownership of the complainants, and of any right, title, or interest of any of the complainants in said property, alleging that the defendant Vicksburg Lodge, No. 26, is a body corporate under the laws of the state of Mississippi by virtue of an act of the legislature passed on the 21st day of February, 1836, which act of the legislature is set out and reads as follows:

“An act to incorporate the officers and members of the Vicksburg Lodge, No. 26, in the town of Vicksburg.

“1. Be it enacted, that the officers and members of Vicksburg Lodge, No. 26, of Free and Accepted Masons, in the town of Vicksburg, be and they are hereby declared a body politic and corporate by the name and style of

the 'Vicksburg Lodge, No. 26,' and by that name shall have perpetual succession, sue and be sued, plead and be impleaded, in any court of law, or equity, in this state, and shall have power to purchase, possess, and enjoy, for their own use and benefit, lands, tenements, and hereditaments, not exceeding in value, twenty-five thousand dollars and personal property, not exceeding in value, five thousand dollars, and may alien and dispose of the same at pleasure.

"2. The said Vicksburg Lodge, No. 26, in their corporate character, may contract and be contracted with, in the name of the said corporation, or in the name of any person, of persons, by them authorized; they shall have power to pass and adopt all such by-laws, as to them may seem just and expedient, for the good order and government of said corporation, not inconsistent with the Constitution and laws of the United States, or of the state of Mississippi, and may have and use a common seal, and alter the same at pleasure, and do and perform all other acts for their benefit not inconsistent with the privileges herein granted.

"Approved February 24, 1836."

It is alleged in the answer and cross-bill: That the building on the said lot was erected solely by the defendant, the Vicksburg Lodge, No. 26, and denies that any concordant was entered into as alleged in the bill, but alleges that Vicksburg Lodge, No. 26, proposed to enter into an agreement embraced in the alleged concordat Exhibit F to the bill, provided all other lodges in Vicksburg would release all claims against the property and assume a *pro rata* of the indebtedness against the building set forth in the proposed agreement or concordat, and alleges that all of the lodges did not agree to such concordat, and never became effective or had any force, but that such concordat or alleged agreement was by one of the lodges placed on record in the deed records of Warren county, Miss., and constituted a cloud upon the title of Vicksburg Lodge, No. 26, by reason of which



it was unable to borrow money upon its property and otherwise handle and use its property, and that after requesting the concordat to be canceled and surrendered by the lodges named in the alleged agreement, which request was refused, that it filed suit in the chancery court of Warren county to have the said instrument and its record in said deed record canceled, making the several complainants in this suit other than the Grand Lodge parties to said suit, and that the Grand Lodge of Mississippi intervened in said suit and was permitted to become a defendant therein, and that after so intervening that the Grand Lodge caused a committee to come to Vicksburg representing the Grand Lodge, and without notice to the attorney in the said suit representing Vicksburg Lodge, No. 26, said committee took evidence and reported to the Grand Master of Masons, and that the Grand Master of Masons, upon said report so made, proceeded to arrest the charter of Vicksburg Lodge, No. 26. That the Grand Lodge of Mississippi was prior to 1871 an unincorporated, voluntary association of persons, but in said year and about the 10th day of April, 1871, said Grand Lodge procured a charter by an act of the legislature entitled "An act to incorporate the Grand Lodge of Free and Accepted Masons of the state of Mississippi, and for other purposes," which charter reads as follows:

"An act to incorporate the Grand Lodge of Free and Accepted Masons, of the state of Mississippi, and for other purposes.

"Section 1. Be it enacted by the legislature of the state of Mississippi, that the officers and members, and all others who may hereafter become officers and members of the Grand Lodge of Free and Accepted Masons, of the state of Mississippi, be and they are hereby declared a body corporate and politic under the name and style of the 'Grand Lodge of Mississippi,' and by that name and style shall have perpetual succession, may sue and be sued, plead and be impleaded, answer and be answered,

in any court of law or equity in this state; may have and use a common seal, and shall have full power to make and enforce such by-laws, rules and regulations as may be agreed upon by the members thereof, and to alter and amend the same at pleasure: Provided, the same are not inconsistent with or repugnant to the Constitution and laws of this state or of the United States.

"Sec. 2. Be it further enacted, that the Grand Lodge of Mississippi shall have full power and authority to hold, possess and enjoy real and personal property, and to sell and convey the same at pleasure, also to take, receive and apply such bequests or donations as may be made to and for the use and purpose intended by said institutions.

"Sec. 3. Be it further enacted, that all regular subordinate lodges constituted under the power and jurisdiction of the said Grand Lodge, together with such other regular subordinate lodges as may hereafter be constituted under the jurisdiction of said Grand Lodge, be and they are hereby declared to be bodies corporate and politic in name and deed, by whatever name or style they may be called or known, with equal rights and powers, to those which are by this act granted to the Grand Lodge, so long as the said subordinate lodges shall remain under the power and jurisdiction of the said Grand Lodge.

"Sec. 4. Be it further enacted, that this act shall take effect and be in force from and after its passage.

"Approved April 10, 1871."

They further allege that a committee representing Vicksburg Lodge, No. 26, went to the meeting of the Grand Lodge of Mississippi in 1913 at Gulfport, Miss., for the purpose of adjusting the differences between Vicksburg Lodge, No. 26, and the Grand Lodge, or a committee representing it, agreed with the representatives of said Lodge No. 26 that if Vicksburg Lodge, No. 26, would dismiss the said suit and apologize to the Grand Lodge for bringing the said suit, and de-

liver up its charter to the Grand Lodge as required by the Grand Master, that such charter would be restored and the said Vicksburg Lodge, No. 26, be reinstated; but that the Grand Lodge after the said charter was delivered as agreed failed and refused to reinstate Vicksburg Lodge, No. 26, and restore its charter, but on the contrary passed a resolution approving the action of the Grand Master of the Grand Lodge in arresting its charter. The answer and cross-appeal also alleged that W. H. Stevens Lodge, No. 121, which came into existence in 1867, on the 8th day of April, 1885, consolidated with Vicksburg Lodge No. 26, the appellant and cross-complainant, and that all property of every kind belonging to the W. H. Stevens Lodge, 121, became vested in and became the property of the Vicksburg Lodge, No. 26, and that the W. H. Stevens Lodge, No. 121, now in existence was chartered by the Grand Lodge in the year 1901. It further alleges that the Vicksburg Royal Arch Chapter, No. 3, was incorporated by act of the legislature of Mississippi on the 27th day of January, 1848, and that Vicksburg Council, No. 2, of Royal and Select Masters, and Magnolia Commandery, No. 2, Knights Templar, have been since their organizations unincorporated, voluntary associations. The cross-bill alleges that it acquired the property in its character as a corporation of the state of Mississippi, and that the Grand Lodge had no power or right to dissolve or extinguish the charter granted by the state of Mississippi, and that it could not be deprived of its property without due process of law, and that it, at its own expense, erected the building in controversy, and that none of the complainants ever contributed thereto, and that it was the sole and entire owner of said building. It further alleges that it has been in exclusive and uninterrupted possession of said building, except that some of the lodges had occupied for a part of the time portions of the building under a lease or rent contract with the appellant.

They also allege that equity did not have the power to declare a forfeiture of the property, and that the Grand Lodge exceeded its power in arresting its charter and undertaking to forfeit its property. It is also alleged that the arrest of the charter under Masonic law did not *ipso facto* forfeit the charter; that the lodge continued as a lodge, but its operation was suspended during the period of suspension or arrest of the charter. The answer was made a cross-bill and the Grand Lodge and other complainants answered the cross-bill, and, in legal effect, admitted most of the allegations of the cross-bill, but asserted that Vicksburg Lodge, No. 26, had regularly sent its representatives of the Grand Lodge, and such representatives had been admitted and participated in the proceedings of the Grand Lodge, and that the Grand Lodge had recognized its representatives as members of a subordinate lodge, and that Vicksburg Lodge, No. 26, had never claimed that they were acting by any other authority or under any other charter than as a subordinate lodge of the Free and Accepted Masons of the Grand Lodge of Mississippi, and that when Vicksburg Lodge, No. 26, filed the suit in Warren county, No. 7095, already referred to, that the Grand Lodge, acting under a valid, legally adopted and reasonable regulation of the Grand Lodge, arrested the charter of Vicksburg Lodge, No. 26, and that all property whether real or personal escheated to and vested in the Grand Lodge of Mississippi. In the answer to the cross-bill the Grand Lodge makes the following statement and admission with reference to its claim of the property involved in this suit:

“Your cross-respondent, the Grand Lodge of Mississippi, has never claimed the property in controversy as a lessee, or in any other manner, by contract, but its claim to an interest in the property is bottomed squarely on the rules and regulations as the Grand Lodge of Free and Accepted Masons of Mississippi, and having the right to govern and control all its

subordinate lodges, including the cross-complainant (Vicksburg Lodge, No. 26) in this cause.”

*Theo. McKnight*, for appellant.

*Moody & Williams*, for appellee.

ETHRIDGE, J., delivered the opinion of the court.

(After stating the facts as above). By the clause last referred to in the statement of facts it will be seen that the Grand Lodge places its right to such property squarely upon the proposition that it, as governing body of subordinate lodges, had a right to make rules and regulations for the government of subordinate lodges, and for their infraction of such rules could arrest or forfeit the charter of subordinate lodges, and as a result of such arrest or forfeiture the property of the subordinate lodge *ipso facto* became the property of the Grand Lodge under section 46 of its rules and regulations quoted in the statement of facts.

Let us first consider the effect and meaning of section 46 of the rules and regulations above referred to. Is such section a contract, as contended in the brief of appellees, between the subordinate lodges and the Grand Lodge? And if it be a contract, is its effect and meaning broad enough to vest in the Grand Lodge all property of a subordinate lodge whose charter may be arrested by the Grand Lodge? We think the admission of the answer to the cross-bill as well as the real meaning of clause 46 is what it purports to be, a rule of law imposed upon the subordinate lodges by the Grand Lodge. In our opinion, the answer to the cross-bill interprets this provision correctly as being a rule or regulation of the Grand Lodge with reference to its being a law instead of a contract. In our judgment, the meaning of this provision is that if from the negligence of the members of the subordinate lodge it

ceases to exist, or if for any reason they voluntarily surrender their charter and go out of business and cease to exist as a local lodge and make no provision or disposition of their property, that in such case this regulation was intended to vest the title of such property in the Grand Lodge as a trustee for the purposes of paying the debts of the defunct lodge and devoting whatever should remain to the purposes of Masonic charity, giving the property acquired for Masonic use and purposes, to the causes and purposes of the Masonic fraternity as understood and administered in its charity work. It was not, in our opinion, intended, and this provision cannot be construed to mean, that the Grand Lodge can arrest or forfeit the charter of a subordinate lodge and by such an act on its part alone itself acquire the property belonging to a subordinate lodge. The clause is to be construed most strongly against the Grand Lodge which enacted it and most favorably to the subordinate lodges which are to be affected by it.

If the construction contended for by counsel for the appellee were accepted as the correct construction, then in this case it would be simply a forfeiture for some contumacy or misconduct of the subordinate lodge, and equity would not lend its aid in enforcing the forfeiture. *Thornton et al. v. City of Natchez*, 88 Miss. 1, 41 So. 498; *Mississippi Railroad Commission v. Gulf, etc., R. R. Co.*, 78 Miss. 750, 29 So. 789. We think the record shows that the property in question was acquired in the capacity of a corporation under the laws of the state of Mississippi, and under its charter set out in the statement of facts this corporation had perpetual succession, power to sue and to be sued, to purchase, to possess, and enjoy for their own use and benefit land, tenements, and hereditaments not exceeding twenty-five thousand dollars in value, and has the power to sell and dispose of such property at pleasure. It also has the power to contract

and be contracted with in the name of said corporation and in the name of any person or persons, authorized by them, and power to adopt all by-laws, etc., not inconsistent with the Constitution or laws of the state. Being a creature of the state of Mississippi having the right to perpetual succession by operation of the law of the state, it could not be dissolved by an action of any other body than the creator, the state of Mississippi, acting through its proper agents and officers. The record shows that after the charter was arrested and before its forfeiture the members of the lodge met and organized the board of directors in accordance with the state charter, and made provision and directions with reference to its property. The chancery court held that the property was the property of the Grand Lodge of Mississippi, and ordered the property sold by commissioners to be applied in accordance with the regulations of the Grand Lodge. We think the chancellor erred in his conclusions, and that under the facts in this record the Grand Lodge acquired no right, title, or interest in this property. It had the right, if it pursued it in the proper way and according to its rules and regulations, to sever the relations between it and the subordinate lodge and to cancel such rights it had conferred by virtue of the charter granted by it and by its rules and regulations. But it did not have the right and power to take from the corporation created under the laws of the state its property without due process of law. Under their charters, both the Grand Lodge and Vicksburg Lodge, No. 26, have all rights conferred under their respective charters, and cannot be deprived of them in any other way than according to the law of the land and due process of law. See *Austin v. Searing*, 16 N. Y. 112, 69 Am. Dec. 665; *Wicks v. Monihan*, 14 L. R. A. 243, 130 N. Y. 232, 29 N. E. 139; *Merrill Lodge v. Ellsworth*, 78 Cal. 166, 20 Pac. 399, 2 L. R. A. 841. The principles announced in these cases are supported in part by *Mt. Helm Baptist Church v. Jones*, 79 Miss. 488, 30 So. 714,

which holds that property rights of religious and other associations are within the protection of the court. In other words, in dealing with all questions of fraternal and social relations the organization may adopt rules and regulations, by which subordinate lodges agree to or are bound to obey, and which are to govern in their trial before the Grand Lodge, but when property rights are sought to be taken by virtue of these inter-relations the courts are open, and they must be taken in accordance with the law of the land.

We are asked by the appellant further to adjudicate the allegations that the Grand Lodge in arresting the charter and forfeiting the property exceeded its power, and we are asked to protect the lodge in its rights within the organization. It seems to be suggested in the pleadings that the charter was arrested and forfeited because of the institution of a suit in the courts of the state for the protection of property rights and that this was in excess of the powers of the Grand Lodge. It is also suggested in the testimony that the charter was arrested and later forfeited without notice and hearing to the Vicksburg Lodge, No. 26, and without an opportunity on its part to appear and present a defense, or produce testimony bearing on these questions. The pleadings in the case do not disclose definitely and certainly what offense, if any, prompted the Grand Master of the Grand Lodge in arresting the charter. No rule or regulation of the Grand Lodge has been pointed out in the pleadings that constitute the foundation of the forfeiture, nor is it clearly and distinctly alleged in the pleadings that the action of the Grand Master and the Grand Lodge was without hearing or notice or opportunity to defend. It appears that the institution of the suit in cause No. 7095 by Vicksburg Lodge, No. 26, in the chancery court had some bearing upon the action of the Grand Master and of the Grand Lodge in taking the action they took. The Grand Lodge is the creature of the state (in its present corpo-



rate capacity), and its power to enact by-laws is given, provided they do not conflict with the law of the land. As under the law of the land every person and corporation is entitled to resort to the courts, for redress of any grievance affecting life, liberty, reputation, and property under section 24 of the Constitution of the state, and as under section 25 of the Constitution no person can be debarred from prosecuting and defending in any civil cause, and as under section 14 of the state Constitution, and the Fourteenth Amendment to the federal Constitution no person can be deprived of life, liberty, or property without due process of law, we are bound to assume, under the allegations and proof in this case, that the institution of the suit in cause No. 7095 was not the sole cause of the action on the part of the Grand Lodge. On the allegations and proof in this record we are bound to presume that the lodge acted in accordance with its rules and regulations, and proceeded from adequate cause to act as it did. We cannot believe that the action of the Grand Lodge was arbitrary and without reason. If such be the case, it would have to be alleged and proven. It is admitted in the court below that the concordat was of no effect, and also in the answer to the cross-bill. It seems to us from a careful and attentive study of this case that there must have been some mutual misunderstanding of the facts by the bodies involved in the suit. We trust that some method may be devised whereby the unhappy situation may be remedied by some satisfactory measure acceded to by all parties. It strikes us that the property should be continued to be used for the benevolent and laudable purposes of the fraternity, and some amicable adjustment ought to be made to restore the property to local Masonic uses. There are, or sometimes may be, relinquishments and concessions that can be made in the interest of harmony and the general welfare. From the reputation of the great Masonic fraternity we believe that with proper effort

the right of all parties may be protected. On the pleading and proof in this suit we cannot determine the rights of the members of Vicksburg Lodge, No. 26, whatever they may be, as they existed when the charter was arrested and forfeited. Some of them have, as shown by the record, gone to other lodges, and we do not wish to be understood in this opinion as foreclosing a proceeding under proper allegations to take care of whatever right they may have. We trust that this question can be settled without further litigation, but on the record as it stands we feel that we are bound to reverse the chancellor and dismiss the bill of complaint as to all of the complainants.

• Reversed and remanded, with direction to the court below to dismiss the bill and wind up the receivership.

*Reversed and remanded.*

---

ENOCHS LUMBER & MFG. CO. ET AL. v. GARBER, ET AL.

[76 South. 730.]

**MECHANICS LIEN. Notice. Priorities. Code 1906, sections 3072-3074.**

Section 3072, Code 1906, making all liens on the same building concurrent and payable in proportion out of the proceeds of the property when sold, applies only to liens for materials furnished to the owner or labor rendered under contract with the owner and does not apply to subcontractors, laborers, and materialmen, who under the provision of section 3074 may bind the amount due the contractor by written notice to the owner, in the order in which their notices are given.

APPEAL from the circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Proceeding by the Enoch's Lumber & Manufacturing Company and others, materialmen, against J. C. Garber, contractor and others. Judgment that rights of parties were equal to concurrent was affirmed and plaintiffs suggest error which was sustained.

---

Opinion of the court.

---

[116 Miss.]

The facts are fully stated in the opinion of the court.

*Green & Green*, for appellant.

*R. H. & J. H. Thompson, Fulton Thompson and Ridgeway & Ridgeway*, for appellees.

ETHRIDGE, J., delivered the opinion of the court.

PER CURIAM. Affirmed.

ON SUGGESTION OF ERROR.

The agreed statement of facts is as follows:

"Come the parties to the above-styled cause by their attorneys of record, and agree: That the agreed statement of facts and the judgment of the court rendered thereon shall constitute the transcript of the record in the case of the *Enochs Lumber & Mfg. Company et al. v. I. C. Garber et al.*, appealed from the circuit court of the First district of Hinds county, Miss., to the supreme court of Mississippi, and that the two documents shall be certified as such and be considered a full transcript in the supreme court of Mississippi for the consideration and final adjudication of the cause.

"Under an order of consolidation, causes numbered 3636, 3637, and 3642, on the docket of the circuit clerk of the First district of Hinds county, Miss., were consolidated under cause No. 3637, thus making all parties in interest parties to 3637.

"Petitioners are materialmen who each severally furnished materials to I. C. Garber, a contractor, used by him in the construction of an annex to the Young Men's Christian Association Building of Jackson, Miss. Mr. Garber's contract was for the sum of two thousand, five hundred eighty-six dollars. No notice was served until the balance due was reduced to six hundred seventy-three dollars and thirty-nine cents (which amount the Y. M. C. A. now tenders into court).

"Thereupon in the following order several notices were served in full compliance with section 3074, Mississippi Code of 1906, upon the Y. M. C. A. of Jackson, Miss., that:

I. C. Garber was due Enochs Lumber & Manu-			
facturing Company..			\$241.80
"	"	" Jackson Lumber Com-	
		pany .....	345.95
"	"	" Bullard Brick Company	259.45
"	"	" Ray Wright .....	130.00
"	"	" Central Lumber Com-	
		pany .....	241.32
"	"	" Morrison Coal Company	80.15
"	"	" Addkison & Bauer.....	42.90
"	"	" S. P. Cagle .....	50.00

—for materials so furnished and used.

"That I. C. Garber was adjudged bankrupt February 12, 1917, and that D. H. Holder was elected and has qualified as his trustee in bankruptcy.

"The sole controverted question is of law. Does priority of notice under section 3074, Mississippi Code 1906, vest a prior right, or are all liens under section 3072, Code 1906, concurrent?"

On this agreed statement of facts the circuit court held that the rights of the several parties were equal and concurrent and that they should have the *pro rata* according to the amount of their claims of the fund paid into court, and this judgment was affirmed on a former day of this court under the theory that these rights would be governed by the provisions of section 3072 of the Code, taken in connection with section 3074. On the suggestion of error, it is insisted that this opinion was error, and that it was contrary to the doctrine of *Herrin v. Mobley*, 61 Miss. 509, and *Spengler v. Lumber Co.*, 94 Miss. 780, 48 So. 966, 19 Ann. Cas. 426. In the case of *Herrin v. Mobley*, 61 Miss. 509, the court held that these notices of subcontractors and laborers are equivalent to garnishment, and that he who was prior in time was

prior in right. In that case a creditor having a judgment garnished, and the notices of the laborers under the statute were filed subsequent to the garnishment, and the court held that the first garnishor, that is, the creditor having a judgment, had a right to have his full demand settled before the ones giving the subsequent notices were satisfied. In other words, the court held that in legal contemplation the rights arising to materialmen and laborers for material and labor rendered to a contractor, under section 3074 of the Code, had only the effect of a garnishment, and the one that first served notice had rights prior to those serving subsequent notices. In the *Spengler Case*, 94 Miss. 780, 48 So. 966, 19 Ann. Cas. 426, the contest was between an assignee of the contractor and subsequent claimants under section 3074, and in an elaborate opinion filed in that case our court quoted from the New York cases, from which state our statute (section 3074) is copied, and demonstrated by those decisions that the rights of each subcontractor or laborer or materialman furnishing a contractor, only became effective from the date of the notice, and that the ones that served the first notices were satisfied in full before the ones serving a subsequent notice could secure any of the funds to be applied upon his claim. After mature consideration of these cases we are of the opinion that section 3072 applies only to liens for materials furnished to the owner or labor rendered under a contract with the owner, and does not apply to subcontractors, laborers, and materialmen, under the provisions of section 3074. The suggestion of error is therefore sustained, and judgment will be rendered here for the appellants in the order in which notices were given. In other words, the claim of the Enochs Lumber & Manufacturing Company is to be first satisfied, and then the claim of Jackson Lumber Company, and the balance, if any, to the Bullard Brick Company.

*Sustained.*

## PIGFORD GROCERY CO. v. WILDER ET AL.

[76 South. 745, Division B.]

1. **ASSIGNMENT.** *Choses in action assigned after suit. Code 1906, section 718.*

Section 718, Code 1906, requiring assignments of choses in action sold or assigned after suit to be filed with the papers in suit, does not apply to an assignment of a judgment terminating the cause of action after suit; that statute was intended to regulate assignments of causes of action after suit and before judgment.

2. **JUDGMENTS.** *Merger of rights of litigants.*

When judgment has been rendered all rights of litigants are merged in the judgment, and such judgment is assignable without any requirement to file a written assignment in the papers of the case in which the judgment was rendered.

3. **GARNISHMENT.** *Assignment of indebtedness before garnishment. Effect.*

Since the statute on garnishment provides that the indebtedness and effects in the hands of the garnishee are bound from the date of the service of the writ, where an assignment of judgment is made, before notice of garnishment is served on the judgment debtor such assignment takes preference over the garnishment.

APPEAL from the circuit court of Lauderdale county.

HON. R. W. HEIDELBERG, Judge.

Suit by the Pigford Grocery Company against B. F. Wilder, wherein the Western Union Telegraph Company was garnished, filing an amended answer, admitting an indebtedness, suggesting that the debt was claimed by Mrs. C. R. Dement and Sams & McCall, attorneys, and praying an interpleader. On motion by Mrs. Dement in the name of Wilder to dismiss the cause, judgment was entered dismissing it, and the Pigford Grocery Company moved to reinstate the order dismissing as a fraud upon their rights. Judgment was rendered for the Pigford

Grocery Company, and an appeal taken to the circuit court and tried *de novo*, resulting in judgment for claimant, Mrs. Dement, from which judgment the Pigford Grocery Company appeals.

*F. V. Brahan*, for appellant.

The law gave the plaintiffs the prior lien to this fund without notice of the assignment from the day of suing out his attachment and having it levied under section 140 of the Code of Mississippi. I submit further, that the court erred in refusing the other refused instruction asked by the plaintiffs which was as follows: "The court charges the jury for the plaintiffs that if they believe from the evidence that before plaintiffs sued out the attachment herein, and the garnishment on the Western Union Telegraph Co. They examined the court's file of papers in the case of *B. F. Wilder* against *The Western Union Telegraph Co.* See section 718 of the Code of 1906, and records of the county and trial docket of the circuit court where said cause was pending to ascertain if any assignment in writing was executed between B. F. Wilder and Mrs. C. R. Dement of said cause, and filed as required by law, and found none, then the lien acquired by plaintiff's levy of his writs of attachment was superior to any rights of the claimant, by virtue of her assignment, unless the claimant has proven to the satisfaction of the jury that before the levy of the plaintiff's writ of garnishment, they had actual notice of the unrecorded written assignment from Wilder to Dement." In lieu of giving this instruction, which I submit is also reversible error, to have refused, the court gave the following instruction for the plaintiffs: "The court charges the jury for the plaintiff that if you believe from the evidence that at the time of the suing out of the attachment herein on November 28, 1914, and the service of the writ of garnishment on the Western Union Telegraph Co. on the

30th day of November, 1914, the claimant had no written assignment by B. F. Wilder to Mrs. C. R. Dement, claimant, then you will find for the plaintiffs in the sum of seventy-seven dollars and ten cents with interest at six per cent from July 8, 1916, to date, and costs of court, unless the jury further believes from the evidence that W. C. Sams, attorney for Mrs. Dement, did not agree to set aside the judgment he had taken in said court on June 5, 1916, and consented to the trial before said justice of the peace on July 8, 1916."

While this instruction was of itself equivalent to a peremptory instruction, in the light of all the testimony in this record as to when the assignment was delivered to the claimant, had the jury been permitted to act on that evidence by the above instruction that the assignment was dated in Georgia on the 27th day of November, 1914, and the attachment was sued out in Meridian, Miss. On November 28, 1914, but as given it which was very prejudicial under the law and the testimony of this record, to the plaintiff, and is reversible error.

The court gave several instructions to the claimant, which I submit were all error and particularly the instruction as follows: "The court instructs the jury that if the jury believes from the testimony that the written assignment was made by Wilder to Mrs. C. R. Dement before the plaintiffs Pigford Grocery Co. sued out his or its attachment then the jury must find for the claimant Mrs. C. R. Dement." The instruction was wrong because it overlooked the essential validity of the assignment, namely, delivery, and the jury were simply told that if they believed the written assignment was made by Wilder to Mrs. Dement which appeared to have been dated 27th day of November, 1914, before the plaintiffs sued out its attachment on the 27th day of November, 1914, they would find for the claimant.

*W. C. Sams*, for appellee.



"A valid assignment of a judgment will defeat a subsequent garnishment of the judgment debtor by a creditor of the assignor, although when the garnishment was served, such debtor had no notice of the assignment. *Schoolfield v. Hirsch*, 71 Miss. 35.

The judgment creditor cannot acquire any greater interest in a garnishee's fund than that held by the debtor himself." *Schuler v. Murphy*, 91 Miss. 518. Also, a judgment may be assigned by parol. *Pass v. McRae*, 36 Miss. 143. Also a judgment may be assigned so as to vest in an assignee an equitable right to it and the power to use the name of the plaintiff in enforcing it. *Van Houton v. Reily*, 6. S. & M. 440. Also as to the precedence of the assignment of a judgment over a subsequent attachment, I cite 2 Ruling Case Law, page 629, paragraph 38, and the cases cited in note, to wit: *Canterberry v. Maringo Abstract Company*, 52 So. 388; *Walton v. Horkan*, 38 S. E. 105.

From the above authorities, it will be seen that a valid assignment can be made without notice to the garnishees and plaintiff and by parol even. Certainly it then cannot be said by appellant with any degree of confidence that the assignment of F. B. Wilder to Mrs. C. R. Dement, appellee, on November 27, 1914, in writing did not convey then and there the interest of B. F. Wilder in said judgment, to appellee. On the other hand, on November 27, 1914, all title and interest of B. F. Wilder, claimed by appellee, passed to and became vested in appellee. This was three days before any process was served on garnishee, the Western Union Telegraph Company by plaintiff in the suit. See page 2, for date of service. The record, on page 76 shows that appellee received said assignment a day or two after November 27, 1914, which would make it November 28, or 29, 1914, at the outside. However, appellee contends that title to said judgment passed to appellee from B. F. Wilder, November 27, 1914, when said assignment was executed.

Therefore, without further discussion of this phase of the question, I submit that assignment in question precludes the appellant from recovery, and the verdict of the jury and the judgment of the trial court, who heard all of the testimony, saw all of the witnesses when they testified, should be sustained by the supreme court on the question of the assignment alone.

ETHRIDGE, J., delivered the opinion of the court.

B. F. Wilder recovered a judgment in Lauderdale county against the Western Union Telegraph Company in 1914, and the case was appealed by the telegraph company to the supreme court. Pending the appeal, Pigford Grocery Company attached B. F. Wilder (who is a resident of the state of Georgia), in a justice of the peace court, and garnished the Western Union Telegraph Company. There was no property levied upon, and no personal service of process. The Western Union answered the garnishment, denying indebtedness but stating the rendition of the judgment and the pendency of the appeal. This garnishment was served on the Western Union Telegraph Company on the 30th day of November, 1914. On the 27th day of November, 1914, Wilder made an assignment to Mrs. C. R. Dement in writing, and acknowledged in the state of Georgia on the 27th day of November, and mailed the same to Mrs. C. R. Dement at Meridian, Miss. The judgment against the Western Union Telegraph Company was affirmed by the supreme court and thereupon the Western Union Telegraph Company filed an amended answer, admitting an indebtedness of two hundred and four dollars and suggesting that the debt was claimed by Mrs. C. R. Dement and Sams & McCall, attorneys, at Meridian, Miss., and prayed an interpleader between the parties. In June, 1916, the case in garnishment sued out in 1914 having been continued, pending the settlement of the appeal in the Western Union Telegraph Case, a motion was made by

Mrs. Dement and in the name of Wilder to dismiss the cause, and judgment was entered dismissing it by the justice of the peace before whom the cause was pending. A few days afterwards the Pigford Grocery Company moved to reinstate the order dismissing as a fraud upon their rights. On this motion the trial justice stated that when he entered the order dismissing it was represented, and he understood, that the order of dismissal was satisfactory to the Pigford Grocery Company. The justice of the peace rendered judgment for Pigford Grocery Company for seventy dollars and ten cents and all costs, and an appeal was taken to the circuit court and there tried *de novo*, resulting in a judgment for the claimant, Mrs. C. R. Dement. From that judgment the Pigford Grocery Company appeals.

It is insisted in argument that the assignment from B. F. Wilder to Mrs. C. R. Dement was void as to the Pigford Grocery Company because the written assignment was not filed with the papers of the case, under section 718 of the Code, and that appellant had no actual notice of such assignment at the date of the service of the writ of garnishment. We are of the opinion that section 718 of the Code does not apply to an assignment of a judgment terminating the cause of action; that the statute was intended to regulate assignments of causes of action after suit and before judgment.

When the judgment has been rendered, all rights of the litigants are merged in the judgment, and such judgment is assignable without any requirement to file a written assignment in the papers of the case in which the judgment was rendered. The statute on garnishment provides that the indebtedness and effects in the hands of the garnishee are bound from the date of the service of the writ. In the present case the assignment had been made and the title of Wilder to the judgment had passed to Mrs. Dement, and consequently there was no indebtedness to Wilder due by the telegraph company on the date upon which the garnishment was served.

It follows that the plaintiff not having a lien prior to the service of the garnishment had no rights to the judgment. This determination makes it unnecessary to decide whether or not the justice of the peace was authorized to set aside the judgment of dismissal at a subsequent term of his court. Judgment is accordingly affirmed.

*Affirmed.*

UNITED STATES FIDELITY CO. v. FIRST STATE  
BANK ET AL.

[76 South. 747.]

1. COUNTIES. *Sale of road bonds. Obligation of buyer. Payment.*

It is the duty and obligation of bond buyers to pay for bonds in actual money, in the absence of an express statute authorizing the taking of something other than money in payment of bonds. but where a check is accepted in payment and actually paid into the proper depository of the county, it will be treated as payment.

2. COUNTIES. *Sale of road bonds. Payment by notes.*

A county depository was not authorized to take as payment for road bonds the individual notes of its offices, held by the purchaser.

3. COUNTIES. *Sale of road bonds. Payment by checks.*

Where a state bank, being a county depository, received a bond issue of a road district of the county, for delivery to a purchaser, and received a check from the purchaser as an advance payment and the check was afterwards paid, this constituted a payment on the bond purchase.

4. SUBROGATION. *Principal and surety.*

Where a county depository, after delivering bonds to a purchaser without full payment of the purchase price became insolvent, and its surety as such depository paid the county the balance due, in such case the surety was entitled to be subrogated as

against the purchaser of the bonds, to the extent of the amount still unpaid to the depository for the purchase price of the bonds.

5. BANKS AND BANKING. *National banks. Ultra vires contracts.*

A national bank cannot be held liable for acts in excess of its charter powers and such bank is not estopped to plead *ultra vires* in defense of any unlawful contract.

6. SAME.

A national bank that executes a contract even beyond its powers, but receives funds or property by virtue of such contract, is liable to the extent that it has received funds or property or has received benefits from such *ultra vires* contract.

7. BANKS AND BANKING. *National banks. Powers. Indemnity.*

Where a state bank being unable to make the bond required as a county depository a national bank procured a surety for it, and in consideration of the execution of the bond, the national bank agreed with the surety to have all funds covered by the bond deposited by the state bank with it, and to execute certificates of deposit and cause the same to be indorsed to the surety, to be held as collateral, and in the event of the failure of the state bank to pay, etc., to indemnify the surety against all loss. In such case the contract was not beyond the powers of the national bank under Rev. St. U. S., section 5136, (U. S. Comp. 1916, section 9661), with reference to the powers of national banks.

8. BANKS AND BANKING. *Title to funds. Duty of surety*

Where a national bank, having undertaken to cause money sent to it by a state bank received under a depository bond to be handled in a particular way calculated to safeguard the surety on the depository bond, it cannot escape liability on the theory that it did not receive notice that a second bond issue had been made, or that the funds received by it from the state bank were funds belonging to the road district since in assuming this obligation, it assumed an obligation to keep in touch with the affairs of the depository and to know the character of the funds it received from the depository.

APPEAL from the chancery court of Calhoun county.

HON. J. G. MCGOWAN, Chancellor.

Suit by the United States Fidelity & Guaranty Company against the First State Bank, S. S. Harris, receiver, and others in which certain parties filed cross-bills. From the judgment rendered, plaintiff appeals.

In 1914 the First State Bank of Pittsboro, being a corporation under the laws of Mississippi, desiring to become a depository of the county of Calhoun, under the laws of the state made its bid for the public money as a county depository, but was unable to make the depository bond on its own financial standing. Having carried an account with the National City Bank of Memphis for several years, an agent of the First State Bank applied to the National City Bank of Memphis to assist it in securing a bond, and as an inducement proposed to deposit the money received as a county depository with the National City Bank of Memphis. The National City Bank of Memphis was anxious to secure the deposit, and went with the agent of the First State Bank to the offices of the United States Fidelity & Guaranty Company and induced that Company to make the surety bond for the First State Bank, entering into a contract with the surety company, which contract recited that the National City Bank of Memphis was desirous of having the First State Bank of Pittsboro, Miss., qualify as a depository for the road funds of district No. 1 of Calhoun county, Miss., and that the First State Bank desired to deposit said fund with the said National City Bank, further reciting that a surety bond for the sum of twenty-three thousand dollars would have to be made under the laws of the state of Mississippi, and that the surety company had been applied to at the instance and request of the National City Bank, and had agreed to execute said bond on behalf of the First State Bank on condition that said National City Bank indemnify the United States Fidelity & Guaranty Company against all loss, cost, and expense that it may incur or suffer by reason of the execution of said bond, and then recited as follows:

"Now, therefore, the National City Bank, in consideration of the execution of said bond on behalf of the First State Bank and the benefits moving to it or accepted by it from said arrangement, does hereby agree to have all said funds covered by said bond deposited by the First

State Bank with it, and to execute a certificate or certificates of deposit in favor of the said First State Bank for all such funds, and cause the same to be indorsed over to the said United States Fidelity & Guaranty Company, to be held by it as collateral security against loss, and in the event of the failure of said First State Bank to pay on demand to said United States Fidelity & Guaranty Company, or its assigns, the amount thereof for settlement with the obligee, or its representatives made under said bond, or to reimburse the said United States Fidelity & Guaranty Company, if it shall already have made such settlement, and otherwise to indemnify and keep indemnified said United States Fidelity & Guaranty Company against all loss, cost, and expenses, which it may suffer or incur because of its execution of and suretyship on said bond, including counsel or attorney's fees in any action hereunder."

This contract was signed by the National City Bank, by its president, and by the United States Fidelity & Guaranty Company, by its attorney in fact, and the said contract was ratified or approved by W. H. Kyle, cashier, and J. M. Speed, R. E. Bodine, and J. M. Tuther, executive committee, of the National City Bank. Thereupon the United States Fidelity & Guaranty Company executed the surety bond of the First State Bank of Pittsboro as depository for said public funds of Calhoun county, and the bank qualified as county depository. District No. 1 of Calhoun county issued road bonds and sold them to parties not involved in this suit, which said funds were paid to the First State Bank as depository, and by it deposited in the National City Bank and paid out by the said National City Bank according to its terms with the United State Fidelity & Guaranty Company and the contract above mentioned. This first bond issue was made in January, 1914. At the July meeting of the board a second bond issue for said road district was authorized, and bonds ordered issued and sold to one G. W. Cole, one of the appellees, at and for the sum of fifteen thousand

one hundred and two dollars, being a premium of one hundred and two dollars, on the face of the bonds. The cashier of the First State Bank represented Mr. Cole in buying these bonds, and the First State Bank having previous to the sale of the bonds and in the month of May 1914, borrowed from G. W. Cole the sum of six thousand dollars, giving the notes of the officers of the bank individually for such debt. The First State Bank was anxious to have Mr. Cole, or some one friendly to the bank, buy said bond issue, and as an inducement to Cole to buy the bonds proposed to pay the premium and the accrued interest on the bonds, making the bonds cost Cole face value.

The bond issue and proceedings thereunder was referred to Woods & Oakley, bond attorneys at Chicago, Ill., for an opinion and approval as to their validity, and while the bonds were being investigated, and before they were executed and delivered to Cole, the First State Bank, desiring further moneys, approached Mr. Cole for a payment of three thousand dollars in advance of the delivery of the bonds, and Mr. Cole gave the bank his check for said sum and took the personal notes of the officers of the bank as security or evidence evidencing the payment of said money, and this three thousand dollar payment was sent to the National City Bank of Memphis with other items, but without any express notice that the three thousand dollars was a payment on the bond issue; Mr. Cole's check being drawn on the Bank of Okolona and collected by the National City Bank and applied to the credit of the First State Bank, and afterwards checked out by the First State Bank in the regular course of business. The bonds were delivered to Cole in September, 1914, at which time he paid one thousand dollars in cash, which was used by the First State Bank on its own account, and gave his check for four thousand four hundred ninety three dollars and twenty cents, and surrendered to the bank the note for six thousand dollars and interest and the note for three thousand dollars, and



another note for about three hundred and fifty dollars, which had been given in payment of Mr. Cole's attorney for making an investigation of the loan for the six thousand dollars. Mr. Cole was given a receipt for the full amount of the bonds, premium, and interest by the county treasurer; said receipt being given in the First State Bank, in the presence of the cashier and Mr. Cole, on the representation of the cashier that Mr. Cole had paid this amount of money into the bank. The four thousand four hundred and ninety three dollars and twenty cents was evidenced by a check of Mr. Cole, which was sent to the National City Bank, being drawn on the Bank of Okolona, Miss. and was collected by the said bank and paid out in due course of business; said National City Bank not being personally notified at the said time that the said moneys or any of them were for payment on the bonds.

In October, 1914, the state bank examiner, S. S. Harris, took charge of the said bank for liquidation, it being found in an insolvent condition, and at said time there was only one hundred and sixty two dollars of said road funds remaining in the bank; the bank having used said funds in its business as a bank, and not in payment of warrants of the road district. The County of Calhoun made demand upon the United States Fidelity & Guaranty Company to replace said moneys making good said expenditures, and the United States Fidelity & Guaranty Company gave notice to the National City Bank and demanded that it pay said amount under its contract with the Guaranty Company. This the National City Bank refused to do, setting up that said contract was *ultra vires*. Thereupon suit was brought by the United States Fidelity & Guaranty Company in the chancery court of Calhoun county, making the National City Bank of Memphis, First State Bank of Pittsboro, and the receiver thereof, and G. W. Cole, and the road district commissioners, parties defendant thereto, and praying that an accounting be made by Calhoun County,

and praying that it be allowed to pay the said amounts found to be due, and to be subrogated to the rights of the county against G. W. Cole and the First State Bank, and praying for a judgment against the National City Bank for whatever moneys and expense it had incurred by reason of the said loss and insolvency of the said First State Bank.

The county filed its answer, disclosing the amount due to it. G. W. Cole filed an answer and cross-bill, setting forth that in making the loan for six thousand dollars, and in surrendering the note for three hundred and fifty dollars and the note for three thousand dollars, he had surrendered to the bank collateral pledged to him to secure his indebtedness, which was good and solvent paper and amounting to more than the total sum of his indebtedness against the bank, and contended that the surrender of said notes constituted a payment of the bonds, but, if mistaken in this, that he be returned the collateral and awarded the proceeds of such notes as have been collected by the bank or state bank examiner in liquidating said bank to be applied to his indebtedness. The bank examiner filed an answer, setting forth that the loan made by Cole was not made to the bank, but was made to individuals, and that the bank was not responsible for said loan, and demanded payment of the balance of the purchase money on said bonds, making its answer a cross-bill. The National City Bank filed an answer, admitting the principal allegations of the bill, other than to its contract and to its liability, pleaded that it was not liable on any contract made by its officers or agents, and that the contract made and exhibited to the bill of complaint was *ultra vires* and void, and that the bank was not in any manner responsible therefor. It further set up in its answer that the funds received on the last bond issue above mentioned were received in the ordinary course of business for the personal account of the First State Bank, and that it had no knowledge that

said funds or any part thereof were proceeds of a bond issue, and had no knowledge that there was a second bond issue, and disclaimed liability altogether.

N. R. Lamar testified that he went to Memphis, representing the First State Bank, and that he took up the matter with its cashier, Mr. Kyle, with reference to becoming a depository, and that Mr. Kyle went with him before the board of directors of the National City Bank, and that the cashier and directors agreed that, if the deposit would be placed with them, they would assist in procuring a bond for the depository, and that they went to the offices of the United States Fidelity & Guaranty Company and made an arrangement by which the Guaranty Company became surety of the First State Bank, and that the funds for the first bond issue were placed with the National City Bank. Mr. Lamar thereafter retired from the First State Bank and was not connected with it at the time of the second bond issue. The National City Bank offered no testimony, other than the testimony of its bookkeeper, who testified as to the accounts between the First State Bank and the National City Bank, and testified that so far as he knew the bank had no notice of the issue of the second bond issue or that the funds sent to it were the funds derived from the sale of such bond issue. The testimony produced on the hearing is voluminous, but supports the facts as herein stated. Mr. Cole testifies that he had no knowledge of the insolvency of the First State Bank at the time of this transaction, and that he surrendered his notes at the request of the bank, and that he considered doing so an accommodation to the bank, as he was satisfied with his notes and securities for the amount of money which he had let the bank have. There are circumstances in the record which tend to show that the bank was hard pressed for money and would cause a reasonably prudent man to apprehend that the bank was not in good condition.

The chancellor entered a decree, in which he adjudged that the county of Calhoun and the road district commissioners were not entitled to recover of G. W. Cole anything on account of the said transactions, and that S. S. Harris, receiver of the First State Bank, was not entitled to recover on his cross-bill against Cole, and that the said original bill of the appellant and the cross-bill of S. S. Harris were dismissed as to Cole, but adjudged that Calhoun county is entitled to recover for the road commissioners of road district No. 1 from the First State Bank and the surety on its depository bond, and the appellant, the sum of fifteen thousand and five hundred dollars, and an attorney's fee of one thousand, and six hundred dollars, making a total of seventeen thousand and two hundred dollars, and all costs, and recited that said money was paid into court, and that the United States Fidelity & Guaranty Company is subrogated to the rights of the county and the road commissioners, but was not entitled to be paid first out of the assets of the First State Bank in preference to other creditors of the bank, and should not be entitled to have the notes and collateral turned over to the First State Bank by Cole treated as a trust fund for its benefit, and adjudged that the Guaranty Company was entitled to judgment over against the National City Bank of Memphis, Tenn., for the balance due the First State Bank on certificate of deposit, with four and one fourth per cent. interest from the 16th day of October, 1914, to the date of the judgment, aggregating a total of four thousand eight hundred and twenty-five dollars and sixteen cents, with six per cent. interest thereon and thirty per cent. of the attorney's fee of one thousand six hundred dollars, from which judgment the United States Fidelity & Guaranty Company took an appeal, and S. S. Harris and the National City Bank also took cross-appeals, to this court.

*W. M. Hall*, for appellant.

The real question then before the court below was whether the Guaranty Company could disaffirm the Bank's unauthorized act and require Cole to pay cash.

As an abstract, general proposition, it may be true that no one except the principal could repudiate the unauthorized act of the agent, but it must not be forgotten what the situation of the parties was, and what tribunal they were in. All parties in interest were before the court, and the court was a court of equity. Equity looks through form to substance and makes immediately liable him who is ultimately liable, and thus prevents wrongs otherwise unavoidable. Storey Equity Jurisprudence, sec. 1250; *Smith v. Peace*, 1 Lea (Tenn.), 585.

The Guaranty Company was in effect made the guarantor of the First State Bank's debt to Cole, because when it took its own notes it became in effect guarantor that the First State Bank would have the cash equivalent to the county's credit, Mr Cole necessarily knew from the Bank's importunities for money that it did not have the cash equivalent to put up, nor can it be said that the cash, if paid, would not have gone to the National City Bank, and the Guaranty Company have been thus protected, for the evidence shows clearly that all the cash received, except the sum of one thousand dollars, actually went to the National City Bank, and it is only inferable from this that the amount of these notes, if paid in cash, would also have gone to the National City Bank under the arrangement between the two banks and the Guaranty Company.

In anticipation of the suggestion that Mr. Cole could have paid the cash to the Bank, and the Bank could have turned right around and taken up the notes out of its augmented cash, we will say that the suggestion throws no light on our proposition, because that was not done, and we are only concerned with the legal effect of what was done.

The county was without authority to ratify such a transaction, because the law contemplates such bonds being sold for money. If the county could not ratify the unauthorized act of its agent, then it was under the necessity to disaffirm. The guaranty company under the law was entitled to be subrogated to all the county's rights. Code, sec. 3733. The county, therefore, being under the necessity of disaffirming, and to subrogate the Guaranty Company to its rights upon what principle can the Guaranty Company in a court of equity which makes immediately liable him who is ultimately liable, be denied the justice of the county's disaffirming its agents unauthorized act.

We come now to the next question. If the county could not be required to disaffirm, it must follow that the agent's act was ratified, and that the county thereby became entitled to those notes taken in lien of cash. 2 Michie Banks & Banking, sec. 161, (3) p. 399; *National Life Ins. Co. v. Mather*, 118 Ill. App. 491; 2 Story in Eq. Juris, sec. 1258.

Now, if the county was entitled to those notes, as it undoubtedly was, the Guaranty Company, when it became subrogated to the county's rights, as it was expressly by the court's decree, became entitled to the notes.

But at this point the receiver of the First State Bank steps in and says in opposition to this that this would give the Guaranty Company a preference, which the supreme court said in *Potter v. Fidelity & Deposit Co.*, 101 Miss. 823, the surety on a depository bond was not entitled to.

That proposition is not tenable, because the trust does not arise from Code, sec. 3485. The Potter case does not in any view militate against the Guaranty Company's contention. Really it could be forcibly argued that the Guaranty Company is entitled to a preference to the extent of the amount of the notes, under Code, sec. 3485, for the simple reason that Cole's deposit with the First

State Bank as depository was unlawful, in view of the depository law's requirement that money shall be paid in, and paid in pursuance of warrants issued by the chancery clerk. Acts 1912, chap. 1914, sec. 6, p. 210. The court will recall that the right to the preference under section 3485 was predicated upon the unlawfulness of the deposit of public funds in *Fogg v. Bank*, 80 Miss. 750; *Metcalf v. Bank*, 89 Miss. 649; *Bank v. Hardy*, 97 Miss. 755; *Green v. Cole*, 98 Miss. 67, whereas the denial of the preference in the Potter case was because the funds under the depository law were legally deposited, being in pursuance of express authority.

We submit in view of this, that the Guaranty Company should have had a decree against Cole for the amount of the three notes.

Claim against National City Bank. This leads to the next question whether the National City Bank's contract with the Guaranty Company is *ultra vires* and void. For the purpose of eliminating from our equation we might as well at this point concede that a National Bank has no power to lend its credit to any person or corporation or become guaranty of the obligations of another for the sole accommodation of the other.

It will be manifest to the court from reading the testimony of N. R. Lamar, Cashier of the First State Bank at the time the depository bond was obtained from the Guaranty Company and of L. L. Bebout, assistant manager of the Guaranty Company that the National City Bank's so-called guarantee or indemnity was in furtherance of its own business, and not an accommodation for the sole benefit of the First State Bank.

It will be apparent from reading Mr. Lamar's testimony that the National City Bank was anxious to get the use of these road funds at the stipulated price, and that it was anxious for the First State Bank to qualify as depositor in order that it might get the funds.

The National City Bank has the power to borrow money. 4 Michie, Banks & Banking, p. 1981. It also undoubtedly had the right to receive deposits, 3 Michie, Banks & Banking, sec. 263, p. 2035. It was also within the power of the bank to give a bond to secure deposits. 3 Michie, p. 2026.

Now let it be noted carefully what the National City Bank's undertaking really was. It was primarily an undertaking on its part to get the road funds from the First State Bank on deposit with its bank, and pay out these moneys only in a certain way.

In 3 Michie, p. 2026, it is laid down as follows: "The power conferred upon National Banks to receive deposits necessarily carries with it the power to contract as to the parties to whom the deposit shall be repaid."

In support of this is cited *Sykes v. First National Bank*, 2 S. Dak. 242, 49 N. W. 1058, in which it is held that where money is deposited in a National Bank under a contract obligating the bank to pay it to a third person on the performance of certain work by the latter, the bank cannot, after the performance of the work, object to the payment of the money to the person entitled thereto on the ground that the National Banking act did not empower it to enter into such a contract. See, also, *Bushnell v. Chataqua Co. Nat. Bank*, 10 Hun. (N. Y.) 378..

The bank actually received on deposit the proceeds from the first installment of road funds to which the contract had reference, and handled the same in accordance with the agreement, and at the time suit was filed had on hand of that installment a balance of seventy-nine dollars and twenty-seven cents, or with interest added at the stipulated rate, eighty-four dollars and twenty-seven cents.

The bank also actually received from the second installment of road funds, three thousand dollars and four thousand, four hundred and ninety three dollars and twenty cents, or a total of seven thousand four hundred and ninety-three dollars and twenty cents.



That the bank was liable for what it actually received, if it was not liable for more, cannot be doubted. *Citizens National Bank v. Appleton*, 216 U. S. 196, 54 L. Ed. 443; See 20 L. R. A. 765; Age 35 L. Ed. 55; *First National Bank v. Anderson*, 172 U. S. 573, 43 L. Ed. 558; *McCormick v. Market Nat. Bank*, 165 U. S. 538, 41 L. Ed. 817; *Emerling v. First National Bank*, 38 C. C. A. 399, 97 Fed. 739; *Am. Nat. Bank v. National Wall-Paper Co.*, 23 C. C. A. 33, 77 Fed. 85; *Hutchins v. Planters National Bank*, 128 N. C. 72, 38 S. E. 252; *First National Bank v. Greenville Oil & Cotton Co.*, 24 Tex. Civ. App. 645, 60 S. W. 828; *Bushell v. Chataqua Co. Natl. Bank*, 10 Hun. (N. Y.) 378; *First Nat. Bank v. Priest*, 50 Ill. 321; *German National Bank v. Henry*, 159 Ala. 367, 49 So. 97. This second installment of funds was credited in the First State Bank's general checking account, and they were checked out by the First State Bank for purposes other than to pay road warrants. In other words, this second installment of funds was not handled by the National City Bank as provided by the contract.

This of course constitutes no answer to the Guaranty Company's demand for the money, because the National City Bank cannot take advantage of its own wrong.

*J. E. Holmes and Wilson & Armstrong*, for cross-appellant.

The powers of a national bank, are given and limited by the statute to "exercise by its board of directors or duly authorized officers of agents, subject to law all of such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security and circulating notes according to the provisions of this title. Revised Statutes U. S., sec. 536; 5 Federal Statutes, Annotated Page, 82.

The business of banking which may be thus carried on, is therefore incidental to and is to be conducted by discounting and negotiating promissory notes, drafts, and bills of exchange and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security, and by issuing circulating notes.

The grant of power of National Banks, just quoted is exclusive. They only have powers incidental to discounting and negotiating notes, receiving deposits, etc. The failure to grant any other or further power to a National Bank; impliedly prohibits the exercise of further powers and they are therefore prohibited from doing any other character of business except those mentioned, such as discounting notes, receiving deposits, etc. *First National Bank of Charlottesville v. National Exchange Bank of Baltimore*, 92 U. S. 122, 23 L. Ed. 681; *Logan County Bank v. Townsend*, 139 U. S. 73, 107 L. Ed. 110, pamphlet page 2; *California National Bank v. Kennedy*, 167 U. S. 368, 42 L. Ed. 201, pamphlet page 7; *First National Bank v. Hawkins*, 174 U. S. 364, 43 L. Ed. 368, pamphlet, page 13.

The power of a National Bank and its officers to make a contract is a question dependent upon the charter rights of the bank. The power to make such a contract and the construction of its charter rights, is a construction of a charter granted by an Act of Congress and therefore a construction of such Act of Congress. The determination of such question is therefore necessarily a federal question. In determining such question and rights and construction, the Federal courts, by their decisions are controlling. They are all questions reviewable, by the supreme court of the United States. The decisions of that high tribunal, are controlling and conclusive. *McCormack v. Market National Bank*, 165 U. S. 548, 41 L. Ed. 544-547, pamphlet, page 19; *California National Bank v. Kennedy*, 167 U. S. 635, 42 L. Ed. 198, pamphlet page 7; *Talbot v. First National Bank of Sioux City*, 185 U. S. 192, 43 L. Ed. 862, pam-

phlet page 25; *Rankin v. Barton*, 199 U. S. 228, 50 L. Ed. 163, pamphlet page 31; *Merchants National Bank v. Wehram*, 202 U. S. 300, 50 L. E. 1040, pamphlet, page 33.

And the state courts follow the Federal rulings on the subject. *National Bank of Brunswick v. Sixth National Bank of Pennsylvania*, 61 Atl. 992; pamphlet page 37; *First National Bank v. American National Bank of Missouri*, 72 S. W. 1060, pamphlet page 41; *Appleton v. Citizens Central National Bank*, 190 N. Y. 418, 80 N. E. 471, pamphlet page 45.

A National Bank has no authority, express or implied, to enter into any contract of guaranty of the obligations of others, unless it is by endorsement and guaranty of paper owned by itself. A contract guaranty of the obligation of another bank or another institution, is *ultra vires* and void. *Seligman v. Charlottesville National Bank* (Circuit Court, Western District of Virginia), Judge BOND in Federal Cases, 12, 642, the leading case; *Bowen v. Neddles National Bank* (C. C. A. 9th circuit), 94 Fed. 95, 36 C. C. A. 553, pamphlet page 97. The supreme court of the United States affirmed this case on application for *certiorari*, 176 U. S. 682, 44 L. Ed. 637; *Commercial National Bank v. Pirie*, 82 Fed. 799, 27 C. C. A. 171, pamphlet page 49; *Merchants Bank of Valdosto v. Baird*, 160 Fed. 642, 90 C. C. A. 338, and note, pamphlet page 56; *Farmers & Merchants Bank v. Smith*, 77 Fed. 129, 23 C. C. A. 91, pamphlet page 61; *Appleton v. Citizens National Bank*, 190 N. Y. 418, 83 N. E. 471, 32 L. R. A. 544, pamphlet page 71; affirmed in *Citizens National Bank v. Appleton*, 216 U. S. 196, 54 L. Ed. 443, pamphlet page 46; *First National Bank v. American National Bank of Missouri*, 72 S. W. 1059, pamphlet page 41. This case reviews the authorities. *First National Bank v. Monroe* (Georgia), 69 S. E. 1123, pamphlet page 79; *Knickerbocker v. Wilcox* (Mich.), 47 N. W. 125, pamphlet page 81; *Thilmany v. Iowa Paper Bag Co.*, 79 N. W. 68, pamphlet page 86; *Norton v. Derry National Bank*, 61 New Hampshire 589, 60 Am. Rep. 334; *Fidelity &*

*Deposit Co. v. National Bank of Commerce* (Texas Court of Appeals), 106 S. W. 783, pamphlet page 90. This case reviews the authorities. *National Bank of Brunswick v. Sixth National Bank of Pennsylvania*, 11 Atl. 889, 212 Pa. St. 238, pamphlet page 37.

Neither the receipt of benefits nor the carrying out of the contract by the other party, can in any way estop a national bank from pleading that a contract made by it was *ultra vires* and void. The contract being beyond the power of the bank, it cannot ratify it nor be estopped to plead it. The contract is void because it is against public policy in subjecting the interest of the stockholders and creditors to unauthorized risks of loss, and no estoppel can make the contract good. This is the settled doctrine of the United States Courts and which is controlling. *Central Transportation v. Pullman's Palace Car Co.*, 139 U. S. 59, 60, 35 L. Ed. 68-69, pamphlet page 100; *McCormack v. Market National Bank*, 165 U. S. 538, 41 L. Ed. 817, pamphlet page 19; *California Natl. Bank v. Kennedy*, 167 U. S. 366, 42 L. Ed. 200, pamphlet page 7; *First National Bank v. Hawkins*, 174 U. S. 364, 43 L. Ed. 368, pamphlet page 13; *Merchants National Bank v. Wehrman*, 202 U. S. 300, 50 L. Ed. 1036, pamphlet page 33; *Citizens National Bank v. Appleton*, 216 U. S. L. 96, 54 L. Ed. 443, 83 N. E. 471, pamphlet pages 46-71; *Greenville Compress & Warehouse Co. v. Planters Compress Co.*, 70 Miss. 369, 13 So. 897, pamphlet page 113; *First Natl. Bank v. American Natl. Bank*, 72 S. W. 1059, pamphlet page 41; *Fidelity & Dep. Co. v. Natl. Bank of Commerce* (Texas Ct. of App.), 106 S. W. 783, pamphlet page 90.

The benefits from the illegal contract which are retained or have been converted by the bank to its own use, may be recovered on an implied contract to return them, but the contract itself has no life, force or validity. *Greenville v. Compress & Warehouse Co.*, 70 Miss. 669, 13 So. 879, pamphlet page 113; *Citizens National Bank v. Appleton*, 216 U. S. 196, 54 L. Ed. 443, 83 N. E. 471, pamphlet pages 46-71.

Even though the contract or act is within the power of the bank if it is out of the usual course of business and therefore extraordinary in its character, such as the borrowing of money, the officers of the bank have no implied authority to perform such act to make such contract. *Western National Bank v. Armstrong*, 152 U. S. 346, 48 L. Ed. 470, pamphlet page 136, and the authorities here cited, under paragraph, 4.

Conclusions. From these propositions of law and fact, it will be seen that the following contentions are made; I. The contract of indemnity and guaranty entered into in this case is void for two reasons: (A) It was out of the ordinary and usual course of business of the bank, and the officers who made it had no authority to make it. (B) It was not only out of the ordinary and usual course of business of the bank, but it, and every part of it are beyond the power of the bank to make, because it is prohibited impliedly by the Act of Congress which chartered the bank.

*W. D. & J. R. Anderson and J. R. West*, for appellee.

Did Cole make a legal payment for the bonds? In the first place we insist that the Guaranty Company is in no position to question the manner in which Cole paid for these bonds. The Guaranty Company we submit is estopped from raising any such question because its own liability was predicated on the idea that the proceeds of these bonds had been paid into this First State Bank. By the terms of its contract as surety the liability of the Guaranty Company was to insure that its principal, the First Bank would "faithfully account for, and in due and ordinary course of business pay over, on legal demand, all moneys deposited with said principal by or on behalf of said obligee. If Cole had not made legal payment for the bonds, then it follows that the proceeds of the sale of the bonds had never been deposited with the First State Bank, and therefore the Guaranty Company never became liable.

We contend that the law in reference to the duties and responsibilities of a mere collecting agent to his principal

relied on by counsel for the Guaranty Company, has no application to the facts of this case. That was not the relation between the First State Bank and Calhoun county. The First State Bank did not occupy that relation. When these bonds were turned over to the First State Bank for settlement with Cole and settlement was made in the manner shown by the evidence, the relation of debtor and creditor existed as between the First State Bank and the County. *Potter v. Guaranty Co.*, 101 Miss. 823, O. C. 829-830, 58 So. 713; *Board of Levee Comr. v. Powell*, 68 So. 71, 69 So. 215; *Guaranty Co. v. Wilkerson County*, 109 Miss. 879, O. C. 888-889.

Everybody concerned in the proceedings of the sale of these road bonds considered what had taken place as a payment for the bonds. The county credited Cole with the payment of the bonds and so recited in its records. The depository treated it as a payment and so showed by its records. And we submit so far as the Guaranty Company is concerned there would be no liability on its part if Cole did not legally pay for the bonds.

We submit it is not the law that Cole was required to pay for these bonds in actual legal tender currency of the United States. "Money" may mean not only legal tender coin or currency, but also any other circulating medium or instrument or token in general use in the commercial world as the representatives of value. If the law required that all bonds issued should be paid for in actual legal tender currency it would be utterly impossible to sell such bonds; in many instance it would be almost if not quite impossible to make payment for the bonds. *Bennett v. Bank of Commerce & Trust Co.*, 220 Fed.—; *Montgomery County v. Cochran*, 121 Fed. 17, 57 C. C. A. 261.

By its bill the Guaranty Company is seeking subrogation to the rights of the county; the creditor, not alone as against the First State Bank, the debtor, but against Cole, the alleged debtor of the First State Bank, the principal debtor for which the Guaranty Company was

surety. Subrogation is the substitution of another person in the place of creditor so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. 37 Cyc. 363.

Now what was the right that the Guaranty Company succeeded to which was owned by the creditor the county? What right did the county have against Cole as to the purchase price of these bonds? The county had acknowledged payment by Cole; the depository had acknowledged payment, and the proceeds of the bonds were treated as in the hands of the county treasurer and in the depository. We submit that the county had no greater right against Cole than the First State Bank, and what right did the First State Bank have against Cole? Suppose the First State Bank had sued Cole for that part of the purchase price of these bonds which Cole paid by surrendering its notes. It looks plain that Cole would have had a perfect defense to such a suit. The First State Bank would not be permitted to repudiate the settlement it had made with Cole for the purchase price of these bonds. The rights of the parties stood exactly the same way after the insolvency of the First State Bank and while it was in the hands of the receiver. The receiver took the assets of the bank in the plight in which he found them. In a suit by the receiver against Cole to recover the purchase price of these bonds that is what we have here by the cross-bill of the receiver, Cole would be entitled if the court had held that his payment for the bonds was not legal, to offset against the claim of the receiver the indebtedness he held against the bank. The fact of the insolvency of the bank could make no change in the principle of set-off and counterclaim. This principle is thoroughly settled by the adjudications of our court. *Von Wagoner v. Gas-Light Co.*, 23 N. J. Law, 285; *Falkenbach v. Patterson*, 43 Bard (N. Y.) 87; *Baine v. Sykes*, 72 Miss. 351, 16 So. 903; *Paine v. Hotel Co.*, 60 Miss. 360; *Eyrich v. Capital State Bank*, 67 Miss. 60, 6 So. 615; *Yardley v. Clothier*, 51 Fed.

506, 2 C. C. A. 349, 17 L. R. A. 462; *Bank v. Kretschmar*, 91 Miss. 608, O. C. 617-618, 44 So. 930.

We contend that it is fundamental that a surety is not entitled to subrogation until he fully pays and discharges the obligation of his principal. It is not sufficient that he discharges the obligation in part. He must either fully discharge obligation or secure its payment in some satisfactory manner to the creditor. 37 Cyc. 374-375, 406; *Lee v. Griffin*, 31 Miss. 632, O. C. 638; *McGee v. Leggett*, 48 Miss. 139, O. C. 146; *Dry Goods Co. v. Kelly*, 80 Miss. 64.

It is undisputed that the Guaranty Company did not discharge the obligation of its principal, the depository, until the final decree was rendered in this case in the court below. That was too late to give the Guaranty Company the right to subrogation. It must have discharged the obligation of its principal before the suit was brought. It is a well established principle that all law suits are tried, so far as the rights of the plaintiff or complainant are concerned, according to the *status* at the time of the bringing of the suit. The plaintiff or complainant must have his claim on which he bases his suit at the time he brings his suit. He cannot acquire it afterwards. He cannot go into court without a just cause and after he gets in, buy up a just cause. 1 Cyc. 744.

However if we are mistaken in our contention so far, how can there be any doubt that if Cole is made to pay any part of the purchase price of these bonds again, to that extent he would be entitled to have returned to him the collateral and the proceeds of the collateral turned over by him to the First State Bank when he made settlement for these bonds. The evidence shows that when he had this collateral, the debt due him by the First State Bank was perfectly secure. I show that the collateral was worth, when he turned it over and when the evidence was taken, about twelve hundred dollars. Surely Cole ought not be made to pay the purchase price



of the bonds again or any part of it, and this collateral also be taken away from him.

ETHRIDGE, J., delivered the opinion of the court.

(After stating the facts as above). This appeal presents the following questions for decision in this case: First. Did the surrender of the notes held by G. W. Cole to the First State Bank as a payment on the bonds constitute a payment in law, or is he liable for the amount of said notes? Second. Is the United States Fidelity & Guaranty Company entitled to subrogation to such liability as may exist against Mr. Cole by virtue of its payment of the funds due to the county? Third. Is the National City Bank liable to the United States Fidelity & Guaranty Company under its contract for the amount paid by the United States Fidelity & Guaranty Company, or any part thereof, and, if for any part what part?

It appears from the evidence that the board of supervisors and county treasurer turned the bonds of the county over to the First State Bank for the purpose of delivering the bonds to Cole and collecting the money from Cole for the benefit of district No. 1 of Calhoun county; said First State Bank being then a duly qualified depository. It appears that the money and payment made by Cole was paid without having obtained a "received" warrant from the chancery clerk under section 352 of the Code but that the receipt given by the depository was made out in duplicate as required by statute. It further appears in the evidence that the county treasurer gave his receipt for the money on the statement that Cole had paid the money into the depository.

We think it is the duty and obligation of bond buyers to pay for bonds in actual money, in the absence of an express statute authorizing the taking of something other than money in payment of bonds. Under the laws of this state, road funds and road bond funds are special funds, and can only be used in the payment of specified warrants,

and do not constitute a part of the county's general funds. We think that nothing can be accepted in lieu of cash, except warrants regularly issued against said fund when outstanding. Where, however, a check is accepted in payment and is actually paid in due course, it will be treated as being a payment of the debt when the money is collected and paid into the proper treasury or depository of the county. Our court has passed upon the question of payment in two recent cases involving the question as to whether an agent, authorized to collect money for a principal, is authorized to take anything other than money in payment. In the case of *Parodi et al. v. State Savings Bank of Jackson*, 113 Miss. 364, 74 So. 280, the court held that a bank, having a draft for collection is required to take money in payment of such draft and if it take anything other than money, in this case a check, which check was not paid when presented, that the bank was not protected, even though the party giving the check was agent of the drawer of the draft and was making the final settlement of the agency with his principal. In that case the person giving the check, at the date of the giving thereof, had funds in the bank upon which the check was drawn, but before the check was presented the bank failed and the check was not paid. In the case of *Bank of Shaw v. Ransom*, 112 Miss. 440, 73 So. 280, this court held that in collecting the check the bank is the agent of the depositor of the claim for collection, and that it was the duty of the collecting bank to collect in money, citing 7 Corpus Juris, 614, 615, and authorities cited therein.

- We think therefore, that the depository was not authorized to take the notes held by Mr. Cole as payment for the bonds. We think, however that, the payment of three thousand dollars in August was understood by all parties to be a payment on the bond purchase, and that, though a note was taken at said time, it was not intended as a loan of money to the bank, and was not so understood by any of the parties to the transaction, and that

this constituted *pro tanto* a payment on the bond issue. It appears that Mr. Cole paid one item of one thousand dollars in cash and another payment by check, which was collected, of four thousand, four hundred and ninety-three dollars and twenty cents, making a total payment by Mr. Cole of eight thousand four hundred and ninety-three dollars and twenty cents and that he should be given credit for said amount on the bond purchase, but should be required to pay the difference to the appellant, as it has paid this amount to the county and road district, and is entitled to subrogation against the purchaser to this extent. If the parties signing the notes to Cole had authority to secure the loan for the First State Bank, and had authority to hypothecate the collateral to Cole, or if the First State Bank ratified the transaction and used Cole's money, then the collateral should be returned to Cole, or such money as was collected on such notes should be paid Cole from funds of the bank. The undertaking of the Guaranty Company was to guarantee the handling of funds paid into the depository, and as these funds never were, in law, paid by Cole, the appellant is entitled to recover them as against Mr. Cole.

In reference to the third proposition, as to liability of the National City Bank to the United States Fidelity & Guaranty Company under its contract, we find that section 5136 of the Revised Statutes of the United States, defining the powers of national banks, provides, first, that it has power to adopt and use a corporate seal; second, to have succession for the period of twenty years, unless it dissolve as therein provided; third, to make contracts; fourth, to sue and be sued in any court of law or equity as fully as natural persons; fifth, to elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, and define their duties, and to dismiss such officers and appoint others to fill their places; sixth, to prescribe, by its board of directors, by-laws not inconsistent with law, etc.; seventh, "to exercise by its board of directors, or

duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security, and by obtaining, issuing, and circulating notes according to the provisions of this title. But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking."

It is settled by a long list of authorities that a national bank cannot be held liable for acts in excess of its charter powers, and that such bank is not estopped to plead *ultra vires* in defense of any unlawful contract; that it had no power to lend its credit by guaranteeing the letter of credit or making and indorsing notes or drafts for the accommodation of other persons. See 5 Fed. Statutes Annotated, p. 82, authorities there cited. It is equally well settled that a bank that executes a contract even beyond its powers, but receives funds or property by virtue of such contract, is liable to the extent that it has received funds or property or has received benefits from such *ultra vires* contract. See *Citizens' National Bank v. Appleton*, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443; *First National Bank v. Anderson*, 172 U. S. 573, 19 Sup. Ct. 284, 43 L. Ed. 558; *Emmerling v. First National Bank*, 97 Fed. 739, 30 C. C. A. 399; *Logan County National Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; *American National Bank v. National Wall Paper Co.*, 77 Fed. 85, 23 C. C. A. 33; *Hutchins v. Planters' National Bank*, 128 N. C. 72, 38 S. E. 252; *First National Bank v. Henry*, 159 Ala. 367, 49 So. 97.

In *Citizens' National Bank v. Appleton*, 216, U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443, the court held that a national bank which, in pursuance of a previous agreement with its debtor that he will apply to the discharge of the

indebtedness a part of the proceeds of a loan to be obtained by him from another bank, requests the making of such loan and guarantees its payment at maturity, must account to the loaning bank for the sum which it receives for its own use in execution of the agreement, even though such guaranty is beyond its powers under the National banking statutes. In *First National Bank v. Anderson*, 172 U. S. 573, 19 Sup. Ct. 284, 43 L. Ed. 558, the court held that where a national bank, which has purchased notes that it holds as collateral when it has been directed to sell them to a third person, may be held liable for their value as for a conversion, even though it is not within the powers of the bank to sell them as the owner's agent. In *Logan County National Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107, the supreme court of the United States held that, where property is transferred under a contract which is merely *malum prohibitum*, the party receiving may be made to refund, to the person from whom it has received the property for the unauthorized purpose, the value of that which it has actually received. "A national bank having the right to hold bonds until reimbursed for its advances, but being bound, upon implied contract, to return them, on demand, when repudiating as illegal the agreement under which it got them, is not exempt, by reason of anything in the National Banking Act, from liability, but is liable for the difference between the price it paid for them and their value at the time it refused, upon demand, to return them in pursuance to the contract made by it for their purchase." In *Wyman v. Wallace*, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738, the United States supreme court held that where a national bank gave notes, when embarrassed by pressing demands, in part consideration of the assumption by the payee of all its outstanding obligations, secured by a pledge of all its assets remaining after turning over cash and such bills receivable as the payee would accept at par, are valid obligations, which can be enforced against the stockholders

after voluntary liquidation. In *Poppleton v. Wallace*, 201 U. S. 245, 26 Sup. Ct. 498, 50 L. Ed. 743, it was held that such obligations were valid obligations, and may be enforced after voluntary liquidation against the stockholders who had voted against liquidation. It will be seen, from the Revised Statutes above quoted from, that a national bank has undoubtedly the right to receive deposits and make appropriate contracts with reference thereto. It has the power to make a bond to secure deposits. 3 *Mitchie on Banks and Banking*, p. 2026.

There seems to be no restriction in the act itself, nor can we see any reason to imply any restrictions, that the bank may make any contract with reference to the receipt of deposits agreeing to handle the deposits in a certain way and to pay them out only in a certain prescribed way necessary for the protection of the parties dealing with it, and we are of the opinion that its contract in this case, by which it agreed to receive the deposits of money paid to the First State Bank as a public depository, and to cause the certificates of deposit to be assigned to the Guaranty Company, was valid, and was not beyond its powers. It appears in the testimony that the cashier of the National City Bank, in discussing this proposition with the agent of the First State Bank, stated that he would rather borrow money at four and one-fourth per cent than to loan money at eight per cent. This statement indicates that the bank's applications for loans were in excess of funds available for loan purposes. Of course, it is necessary for a bank to have funds to loan its customers, when needed, to retain them. It is also one of the methods by which banks make money, borrowing money at a smaller rate and loaning it at a higher rate. In this way it also serves the interests of the public in receiving money, which depositors do not need, or do not care personally to handle, by way of deposits, and loaning it out at interest to people who desire to borrow, and we think that that part of the contract between the National City Bank and the Guaranty Company that provided for

the method of handling this fund and by which the bank undertook to see or agreed would be done was not beyond its powers.

It having undertaken by contract to cause that money sent to it by the First State Bank received under the depository bond should be handled in a particular way, calculated to safeguard the interest of the surety company, without serious inconvenience to the National City Bank or to the First State Bank, we think it cannot escape obligations which it imposed upon itself in this regard on the mere theory that it had not received notice that the second bond issue had been made, nor notice that the funds received by it from the First State Bank were in reality funds belonging to the road district. In assuming this obligation, it assumed an obligation to keep in touch with the affairs of the depository, and it was an easy matter for it to learn from the public records that this bond issue had been sold and the money paid into the depository. It was the duty of the National City Bank under the facts in this case, when it received remittances from the First State Bank, to determine the character of the funds so received, whether they were public funds or private funds of said bank. We think there is no *ultra vires* act with reference to this part of the agreement.

We do not think the National City Bank's liability is limited to profits it may have made out of this transaction. Indeed, the transaction might have been a losing one to the bank, and still it would be liable for the moneys actually received. It having imposed a duty upon itself to deal with this fund in a specific way, it cannot escape liability by pleading ignorance of facts it should have known under its contract, and could easily have ascertained by reasonable diligence. We think the National City Bank is liable to the Guaranty Company to the extent of the funds that actually passed through its channels, to wit, the amount of seven thousand four hundred ninety-three dollars and twenty cents, and for attorney's fees which the Guaranty Company had to pay by reason

of the default of the First State Bank and of the National City Bank in not carrying out this contract as agreed to.

In order that the court below may not be hampered in administering the rights between all the parties to this litigation in accordance with the views expressed in this opinion, the case is reversed on both direct and cross appeals; the costs of appeal to be taxed against the appellees.

*Reversed and remanded.*

F. O. EVANS PIANO CO. v. TULLY.

[76 South. 833, In Banc.]

**SALES. Sales on trial. Failure to return. Acceptance.**

Under a contract for sale of a piano on trial which provided that the buyer accepted the seller's offer to try one of its pianos, that without obligation on his part to purchase, the seller might ship the piano ordered below; that after testing the instrument for thirty days, if the buyer decided to keep it, he would pay for it as stated below, and would sign the selling contract and that if he decided not to keep it, he would return it to the freight depot subject to the seller's order, the buyer was under duty either to accept the piano or return it to the depot of a common carrier at the end of the 30 days' trial, and where the buyer made no effort whatever to return the piano, and did not respond to the seller's numerous letters for several months, he must be treated in law as having accepted the piano and was liable for the price.

APPEAL from the circuit court of Jones county.

HON. P. B. JOHNSON, Judge.

Suit by the F. O. Evans Piano Company against A. J. Tully. From a judgment for defendant, plaintiff appeals. The facts are fully stated in the opinion of the court.

*Welch & Street*, for appellant.



Whether the time of the offer for the return of the piano be fixed on August the 14th, the date of the letter of Mrs. Tully, asking for shipping instructions, or September the 14th, 1914, the date of the letter of Tully himself asking for shipping instructions, or the somewhat indefinite date prior thereto fixed by the appellee in his testimony at not more than four months before that time be established as the date of offering to return the piano, was not that such an unreasonable time that the plaintiff was warranted in believing that the appellee had elected to keep the piano? If he could keep the piano four or five months after the expiration of the thirty day period, why couldn't he keep it for a year for the purpose of testing it, and then for two years and then for three years? In the case of *Morse v. Bellows*, 7 New Hampshire, 549, 28 American Decision 372, the court said: "A proposition, to become binding on the making it, must be accepted within a reasonable time; but what constitutes a reasonable time, when no time is specified, is a question of law, and depends on the subject-matter and the situation of the parties." And to the same effect is a decision of the court in the case of *Hill v. Hobart*, 16 Maine 164, where the court said that where the facts are clearly established, or undisputed, or admitted the reasonable time is a question of law. And in defining a reasonable time, the court said in the case of *Scannell v. Am. Soda Fountain Co.*, 161 Mo. 606, 61 So. 889, "that is a reasonable time that preserves to each party the rights and advantages he possesses, and protects each party from losses that he ought not to suffer."

In the case of *Hargadine-McKittrick Dry Goods Co. v. Renolds*, 64 Fed. 506, it was held as a matter of law that a delay of six days in answering an *ultimatum* as to the price of goods was unreasonable. See, also, the case of *Moxly v. Moxly*, 59 Ky. 309, in which it was held that if no definite time is stated the inquiry as to what is a reasonable time within which a proposition must be accepted is as to what time it is rational to suppose that

116 Miss.]

Brief for appellant.

the parties contemplated; that the law will decide this to be that time which, as rational men, they ought to have understood each other to have in mind.

The case of *McFadden v. Henderson, et al.*, 128 Ala. 221, 29 So. 640, is an interesting case holding that a question of time or construction of a contract where the facts are undisputed is a question for the jury. See also the cases of *Felnorth v. Foley*, 98 Ala. 176, 13 So. 485, and *Branhill v. Howard*, 104 Ala. 412, 15 So. 1, to the same effect.

But why should the court make a contract for the parties they did not make for themselves. Any effort on the part of a court to make contracts for the parties by reading into the contract something not there has always lead to endless confusion and dissatisfaction.

The parties are all of age, there is no suggestion of improper influence, undue influence or unfair methods. The parties entered into a solemn contract in writing. Why should the court read into the contract something the parties to it did not write into it? How can the court say that though given thirty days in which to return the piano, the defendant shall have in addition to thirty days a further reasonable time. Tully seems to be able to take care of himself. Why didn't he write into the contract that he was to have a reasonable time, or four months' time after the expiration of thirty days to return the piano? By the way, he contracted to return to freight depot not to write letters offering to return.

But if we are incorrect in our contention that the appellee had only thirty days in which to return the piano if he elected not to take it, and the court was correct in ruling that he had a reasonable time thereafter in which to return it, then we respectfully insist that what was a reasonable time was for the court to say as a matter of law and not a question for the jury. And in support of this contention we respectfully urge the court to read the case of *Aymar v. Beers*, 17 Am. Decision, 538, and the very interesting and instructive note thereon by Judge

FREEMAN, but if we are incorrect as to this and this was a proper question for a jury, then we do most earnestly insist that it was a question that should have been submitted only on competent testimony and the testimony of the appellee as to what he had written to appellant was certainly incompetent, yet this testimony no doubt influenced the jury to bring in a verdict for the defendant. We think the letter written by appellee's wife was competent. The appellee had notice of the letter and its contents by the reply addressed to appellee and coming into his possession. Failing to repudiate the agency then, he should not be permitted to do so now.

We confidently ask for a reversal of the case and for judgment here.

*Deavours & Hilbourn*, for appellee.

The burden of appellant's complaint is that appellee did not ask for shipping instructions soon enough after the piano was delivered to him; that he did not return the piano in time. We submit that if the contract sued on was an executory contract of sale, which it is not, even then he would be under no obligation to actually return the piano.

"It is not necessary that the buyer, in an executory contract depending for validity upon acceptance after examination, should actually return, or offer to return the goods, especially when the distance is great, and the freight charges large." *Strauss v. National Parlor Furniture Company*, 76 Miss. 342, 24 So. 703, and the authorities there cited.

Was the right result reached in the court below? As we understand it, this is the only question about which this court is concerned; that the court will not reverse this case on account of the admission or exclusion of evidence, or on account of instructions given, if taking the record as a whole, the correct result was reached. Appellant bases its suit on the contract sued on; on this it must stand

or fall. We submit that an examination of the contract, and of the correspondence between the parties after the execution of the contract, will show that neither party considered this a sale or contract for sale; the company repeatedly asking Tully to sign the contract. Tully declining to do anything except to return the piano to the depot in accordance with the contract.

We therefore submit that the judgment of the lower court is eminently correct, wholesome and proper and that it ought to be affirmed by this court.

ETHRIDGE, J., delivered the opinion of the court.

Appellant, a piano dealer of Chicago, Ill., placed a piano with Tully, at Laurel, Miss., under a contract signed by Tully, which is substantially as follows:

"I accept your offer to try one of your Evans Artist Model pianos. Without any obligation on my part to purchase, you may ship the piano ordered below. After testing the instrument for thirty days, if I decide to keep it, I will pay for it as stated below, and will sign your selling contract which is a part hereof. If I decide not to keep it, I will return the piano to the freight depot, subject to your order."

Then follows a description of the piano and the terms of sale, in which it was agreed to pay for the piano in monthly installments. The piano was shipped to Tully on this order. On December 31, Tully wrote that the music rolls had been received, but that the piano had not arrived, although he had phoned all the freight offices. On January 8, 1913, Tully wrote to the piano company that the piano had arrived that day in bad condition, there being some marks on the keys, and the player out of commission; that it seemed to have been roughly handled in transit. He also returned the freight bills and requested check to cover same, also requesting the piano company to have its agent call and look over the piano. On January 13th the piano company wrote Tully, acknowledging receipt of his letter of the 8th, and inclosing check for the freight bills, but returned the freight bills and asked that Tully

have the agent mark on the freight bills that the piano was received in bad condition, so that damages could be collected from the carrier, and directed Tully to have the piano returned, if it could not be satisfactorily fixed, and another would be sent. It was also suggested that he get a piano tuner to look over the piano and see if it could be put in proper condition, and to send the bill to the piano company for payment. To this letter the appellee did not reply. On February 28th the piano company again wrote Tully, asking him to have the piano fixed, and to have the freight bills marked by the agent so they could collect damages from the company. There was no reply to this letter, and on March 11th the piano company again wrote Tully along the same lines. No reply was made to this letter, and on March 19th the piano company wrote another letter along the same lines. On March 27th the company wrote another letter, to which no reply was received, and again on April 4th, 10th, 18th, and May 6th. May 10th, Mrs. Tully, wife of appellee, wrote the piano company, stating that they had been away from home for some time, and that the piano was in good hands while they were away, stating, also, that when the piano was received the player mechanism had dropped about one and a half inches, and was resting on the keys or hammers, and that they had a tuner fix the same, who only had to straighten the bolts that supported the player, and which had been bent, for which there was no charge; that the piano needed tuning, but was otherwise all right, and stating that every one who saw the piano thought it was a beautiful instrument. On May 20th appellant replied to this letter and requested a signature to the contract and a remittance, but no answer was received to this letter. On June 29th appellant again wrote Tully, and again on August 12th. On August 14th Mrs. Tully wrote in reply to the letter of the 12th that she did not think the piano was what they wanted. On August 18th appellant replied to this letter, calling attention to its numerous letters in which appellee had been urged to either return the piano or sign the contract, and to have the freight bill marked by the agent, and

stating that they could not take back the piano under the circumstances. Appellee testifies, and also Evans of the piano company. Appellee contended in his testimony that the piano was not in good condition, and was not up to representations, etc. At the conclusion of the evidence, plaintiff requested a peremptory instruction, which was refused by the court. Appellant also requested an instruction that the defendant was under obligation to return the piano within a reasonable time after the thirty-day trial period, to some common carrier or railroad for reshipment, and if the jury believed the defendant did not, within a reasonable time, return the piano, their verdict must be for the plaintiff, which was also refused.

We think that, under the contract, the appellee, defendant below, was under the duty to either accept the piano or return it to the depot of a common carrier at the end of a thirty-day trial period, and as the proof shows there was no effort whatever to return the piano, and that the defendant below did not respond to the numerous letters of the plaintiff between January 13th and May 8th, he must be treated in law as having accepted the piano. The peremptory instruction for the appellant should therefore have been given. The judgment of the court below is accordingly reversed, and judgment will be entered here for the appellant.

*Reversed, and judgment here.*

STEVENS, J. (dissenting). A reversal of this case is based upon the claimed right of the piano company to a peremptory instruction. This expression of my views will be directed solely to this point. As I construe the one and only contract executed by Mr. Tully, it is an agreement merely to permit the Evans Piano Company to place one of their musical instruments in Tully's home to be tried or tested without any obligation whatever on the part of Mr. Tully to buy. This is the express language of the contract itself. It says:

"I accept your offer to try one of your Evans Artist Model pianos. Without any obligation on my part to purchase, you may ship the piano ordered below."

The primary condition upon which Mr. Tully permitted the piano to be installed in his home was stated in the language, "without any obligation on my part to purchase." There is another significant statement in this contract, and that is when appellee had tested the instrument and had decided to keep it he would then for the first time execute a contract of purchase. The language is, "if I decide to keep it, I will pay for it as stated below, and will sign your selling contract, which is a part hereof." If he decides to keep it he will then "sign your selling contract." This so-called "selling contract" does not seem to be incorporated in the record, and I do not know what its proposed terms and provisions are. It was evidently a blank form to be filled out later with the privilege to pay for the piano on the installment plan. It may also have made provision whereby the vendor retained title as security. The contract then which Tully signed was not a contract of purchase. The court now makes him take the piano, and compels him to assume the attitude of purchaser simply because Tully did not return the piano to the depot within such time as the court thinks reasonable. The question of what was or was not a reasonable time was submitted to the jury under instructions from the court, and the jury by their verdict has found that Tully did not keep the piano an unreasonable length of time. There is indeed room to suspect that Mr. Tully did not act in the utmost good faith, or at least did not act diligently, but his testimony explains this. He says that when the piano arrived "it was in bad condition. It was badly torn up and broken in transit, and badly out of tune, too." He furthermore testifies that "it was not as represented. It was of very poor grade." This testimony on the part of the appellee is uncontradicted. It was offered to ex-

plain the necessity for having the piano repaired before a fair test could be made. Mr. Tully furthermore testifies that he notified the house of his dissatisfaction, and "asked twice for shipping instructions on it;" that they never gave any shipping instructions, but insisted upon his signing the contract of purchase, the very contract which the preliminary agreement contemplated. It is significant also that the tentative agreement nowhere states the terms of the trade, but leaves blank spaces unfilled. The purchaser had the right to pay cash within thirty days, and receive one kind of discount, or to pay cash in sixty days, and receive another and different discount, or the option to pay at ten dollars cash after thirty days and the balance at the rate of ten dollars a month. The declaration here sues for the entire price, and it is nowhere intimated that Tully agreed to pay cash for the piano. There is, then, not only an absence of an agreement to buy at all, but especially an absence of any agreement to pay cash. As I see it, there is an absence of mutuality. It is shown that appellant had an agent in this territory, and that appellee requested that the agent call. Instead of the agent calling to see about the damage to the piano, and having the instrument tuned, the piano house was writing letters to Mr. Tully asking him to have this done, and at the same time asking that he sign the contract. The piano company at no time requested Tully to reship the piano, and at no time gave shipping instructions. They do not seem to have been interested in having the piano reshipped, but at all times were demanding an execution of the written contract of purchase. The contract which the correspondence asked Tully to sign gave him benefit of the monthly payment plan. This is sufficient to show that there was no definite agreement as to terms. The agreement, then, was simply an agreement to agree; an agreement to experiment with, to try or test. This being so, when Tully declined to execute any contract



after the expiration of the thirty-day period for trial, he should not be compelled to pay for the piano, and cannot be compelled to do so except upon the doctrine of estoppel. Of course, if Tully had, after the thirty days, signified an acceptance, or had, as in some cases of this kind, attempted to sell the property as his own, an acceptance would be conclusively presumed and the purchaser would be liable. But there is no showing that Tully exercised actual ownership over the property inconsistent with his expressions of dissatisfaction. There is no evidence whatever that he even used the piano after he decided it was not up to representations and what he wanted. He swears that he not only wrote letters to the house offering to return and asking for shipping instructions, but he also offered to return the piano to appellant's attorney, Mr. Welch, and he kept up this offer on the trial of the case. Mr. Elliott, in discussing the effect of the intention of the parties to reduce the contract to writing says:

"That if all the terms of the agreement have not been settled, and it is understood these unsettled terms are to be determined by the formal contract, there is no binding obligation until the writing is executed;" that the intention of the parties to enter into "a formal written agreement is strong evidence that the negotiations prior to the drawing up of such writing are merely preliminary, and not understood or intended to be binding." Elliott on Contracts, par. 63.

This is the case here. I think also it should be remembered that this case does not present a purchase of farming implements or machinery to be utilized in business. It is also not a case where a merchant is buying articles of merchandise, on receipt of which the purchaser can readily determine whether he wills to accept or reject. This is the purchase of a "player piano," a musical instrument, the mechanism of which the average individual knows practically nothing. It is not uncom-

mon practice for the agents of piano houses by much importunity to induce householders to let them place their pianos in the home in order to excite the interest of prospective purchasers. On January 8, 1913, as soon as the piano arrived, Mr. Tully in writing the company stated that the player was "out of commission altogether," and further stating, "if your agent, Mr. Hardy, is in the vicinity, I would be glad if he would call and look at the piano himself." But Hardy, it seems, had accomplished his purpose to get the piano in Tully's home, and he was not interested in getting it out. The opinion of the court forces Tully to buy a piano and piano player against his will.

The court gave the plaintiff the following instruction:

"For the plaintiff the court instructs the jury that defendant was under obligation to return the piano within a reasonable time after the thirty-day trial to some common carrier or railroad for reshipment, and if you believe the defendant did not within a reasonable time return or offer to return the piano, your verdict must be for the plaintiff."

This left the issue of "reasonable time" to the jury, and the verdict of the jury on this issue is against appellant.

The views I have find support in the following cases: *Y. & M. V. R. R. Co. v. Jones*, 75 So. 550; *Walter A. Wood Mowing & Reaping Mch. Co. v. Calvert*, 89 Wis. 640, 62 N. W. 532; *Cooke v. Underhill Mfg. Co.*, 138 N. Y. 610, 33 N. E. 728.

METROPOLITAN CASUALTY INS. CO. v. SHELBY.

[76 South. 839, Division B.]

INSURANCE. *Accident insurance. Construction. Severance of hand.*

Under an accident insurance policy providing a specific indemnity if insured should sustain the loss of a hand by severance at or above the wrist, where there was an injury to one of insured's hands whereby he lost the use of it to a great extent, such an injury was not covered by the terms of his policy, as "severance" means the removing any thing, etc., the act of severing or dividing, or separating, the state of being severed or separated, or the state of being disjointed or separated.

APPEAL from the circuit court of Forrest county.

HON. P. B. JOHNSON, Judge.

Suit by Joe Shelby against the Metropolitan Casualty Insurance Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*L. A. Smith*, for appellant.

*Tally & Mason*, for appellee.

COOK, P. J., delivered the opinion of the court.

The appellee, Joe Shelby, instituted this action at law in the circuit court of Forrest county against the Metropolitan Insurance Company. In his declaration he avers that the insurance company had issued and delivered to him an accident policy in the principal sum of seven thousand, five hundred dollars; that among other things this policy promised to pay to him three-fifths of the principal sum, to wit, four thousand, five hundred dollars, should he, during the life of the policy, "sustain the loss of one hand by severance at or above the wrist, and in addition

thereto the sum of fifty dollars, for surgical and medical attention in and about or treating the wound inflicted as aforesaid." The declaration then proceeds to relate the cause and extent of the injury sustained by him, in these words, viz.:

"That thereafterwards, on the 11th day of May, 1916, while the said policy was in full force and effect the said plaintiff was out on a fishing expedition and going through the forest, carrying in his left hand an instrument made of glass the size of a gallon jar and commonly denominated a 'minnow trap'; and by some means or other unknown to plaintiff he became entangled in the brush in said forest and fell to the ground and the minnow trap coming in contact with the ground, trees, brush or some substance then and there became broken and crushed and when and where plaintiff sustained a very severe contusion on his left arm just immediately above and in juxtaposition to the wrist joint; that as a result of said injury plaintiff then and there suffered much loss of blood and became and was then and there very sick, sore, and lame, and in fact languished in deadly peril for several hours until medical attention could be given him; that this accident happened to him several miles distant in the forest from his home in Hattiesburg; that as soon as he could he and his companion who was with him on said fishing excursion repaired to the city of Hattiesburg where his wounds and injuries were dressed by a competent doctor; that the said doctor continued to dress his wounds and injuries for a long time, until the cut or contusion had become in a measure healed; but that to cure the said plaintiff where he received said wounds and injuries the physicians have been unable so to do; that as a result of the same his said left hand from the wrist to the ends of his fingers has become paralyzed and atrophied insomuch so that said hand is of no use or value whatever to said plaintiff; that he is unable to use it in any respect; that he is deprived of the use thereof as fully and completely as if the same were physically severed and removed from his

wrist and arm. So that plaintiff says there has been an absolute loss of his left hand at or above the wrist as fully and completely as if the same was physically severed and removed from the remainder of his body; and as a result thereof he says that he is entitled to recover of the defendant three-fifths of the full indemnity provided for in said policy, to wit, the sum of four thousand, five hundred dollars."

The insurance company demurred to the declaration, and the court promptly overruled the same. Defendant then filed the general issue and a special plea, which last-named plea we do not set out in this opinion, because we think it is unnecessary to do so, in our view of the issue presented to this court.

When it came to the proof of the averments of the declaration, it may be said in a general way that they were proven, and a bit more. Without dispute, the hand was not severed at or above the wrist; in fact it was not severed at all. The evidence does show that plaintiff had lost the use of his hand to a great extent, but his hand is still there. He had simply lost the use of his hand to a great extent.

Among the definitions given by Mr. English in his Law Dictionary of the word "severance" is "removing anything from the realty, as trees, crops, etc." The same author defines "sever" as "to put apart." The Revised Encyclopedic Dictionary defines "severance" this way: "The act of severing, dividing or separating; the state of being severed, separated; the state of being disjoined or separated." All of the standard dictionaries give similar definitions.

If the indemnity was for the loss of a hand, without qualifying words, there is much reason for the construction put upon the contract. In this contract the words employed define the meaning of the loss of a hand provided for in the policy. No doubt authorities may be found for the holding of the trial court. It would be difficult to state any proposition of law upon which the courts of this

country have not differed, but in the language of this court in *Jacobs v. Insurance Co.*, 71 Miss. 656, 658, 15 So. 639, we say:

"The denial of all liability by the company, on the facts of this case, does not need the support of adjudications, and we have not examined any, preferring to rest with perfect confidence on the unmistakable meaning of the written agreement, which no number of books . . . could change so as to create liability except on the terms it expresses."

We quote, however, to approve, from *Weist v. Insurance Co.*, 186 Mo. App. 22, 171 S. W. 570:

"In the instant case, had the provision of the policy agreeing to indemnify plaintiff in the amount of the principal sum of the policy for the 'loss of one hand' stood entirely alone, and unaffected by any other provision thereof, beyond doubt plaintiff would have been entitled to recover, having lost the entire use of his hand. However, the very next paragraph of the policy provides, in unmistakable terms, what shall be meant by the 'loss of one hand'; to wit, the loss thereof by severance at or above the wrist joint. Plaintiff has not suffered a loss of his hand by severance at or above the wrist joint; and if effect is to be given to the last mentioned provision, plaintiff's case must fail. If any ambiguity or uncertainty of meaning could be said to inhere in the pertinent provisions of the policy, it would readily be resolved in favor of the insured and against the insurer. Such is the well established and wholesome doctrine with respect to the construction of insurance contract. As is said by LAMM, J., in *Mathews v. Modern Woodmen*, 236 Mo. loc. cit. 342, 139 S. W. 155, Ann. Cas. 1912D, 483: 'It is a just and settled rule that the restrictive terms of insurance contracts shall be taken most strongly against the insurer. The doctrine of *contra proferentem* is strictly applied with unaccommodating vigor, and . . . ambiguities are blandly resolved in favor of the insured.' If it appeared that the portions of the policy under consideration, when read and

construed together, were at all ambiguous or of doubtful import, we should not hesitate in the least to 'blandly' resolve such ambiguity or doubt in favor of the insured. Indeed, the policy should, if possible, be construed so as to effectuate the insurance, and not to defeat it; for the indemnity is the very object and purpose of the contract, for which the insured has paid a consideration. See *Stix v. Indemnity Co.*, 175 Mo. App. 171, 157 S. W. 870. But it appears that the defendant has chosen apt language to indicate that it does not agree to indemnify the insured for the loss of a hand, unless such loss shall consist in the actual physical severance of the hand at or above the wrist joint. It is by no means likely that the policy holder so understood, or that he would knowingly have accepted the policy with such restrictive limitations upon his right to recover the indemnity for the loss of a hand or foot; but we can find the intention of the parties only from the language employed in the contract, having regard to the rules of interpretation which may be applied to contracts of this character. We cannot 'blandly' construe the troublesome provision out of the contract, and disregard it altogether; for, however great may be our inclination or duty to protect a policy holder against intricate or obscure technical provisions designed for the avoidance of liability on the part of the insurer, we cannot make a contract for the parties. The stipulation in question, as we have said, follows immediately that portion of the policy providing for specific losses, in the same type in which the body of the policy is printed. Its meaning appears to be plain and unmistakable. It pointedly defines what shall constitute the 'loss of a hand' so as to entitle the assured to the indemnity provided therefor. Under the circumstances, it cannot well be said to constitute a 'snare to the unwary' such as is denounced in *La Force v. Insurance Co.*, 43 Mo. App. 530. See, also, *Stark v. Insurance Co.*, 176 Mo. App. 574, 159 S. W. 758. Nor do we perceive any ground upon which plaintiff may properly be relieved from the effect thereof. Our conclusion is that the learned

trial judge committed no error in forcing plaintiff to a nonsuit. The judgment must therefore be affirmed."

It is quite clear to us that the learned trial judge misinterpreted what we deem as the plain, unambiguous terms of the policy, and to approve his construction we believe we would have to make for the parties a contract they did not make for themselves. The plaintiff was undoubtedly severely injured, and it is a pity that he may not, to some extent, be compensated for his loss, but it is not the province of the courts to make contracts for litigants, but to enforce contracts made by them.

*Reserved and dismissed.*

**MARYLAND CASUALTY CO. ET AL. v. LAUREL OIL &  
FERTILIZER CO.**

[76 South. 875, Division B.]

**1. INSURANCE. Actions. Question for jury. Peremptory instruction.**

In an action by an employer against a casualty company on its policy to indemnify such employer for all loss of money, etc., constituting larceny or embezzlement by an employee, it was improper for the court to grant a peremptory instruction for the employer, where the employee gave testimony which if true showed that the shortage in his accounts did not come about by any act of larceny or embezzlement on his part.

**2. SAME.**

In such case it was improper for the court to exclude testimony offered by the employee showing that he had not embezzled or stolen any of his employer's money or property.

**3. INDEMNITY INSURANCE. Requirement that insured prosecute.**

It is a reasonable contract where one party is insuring against acts constituting larceny or embezzlement to stipulate that the assured shall give information and institute prosecution, when required to do so, of all offenses on the part of the employee insured against.



4. PLEADING. *Withdrawal of plea, Abandonment of defense.*

Where in an action by a fertilizer company against a casualty company on its policy to indemnify for loss sustained by larceny or embezzlement of employees, the casualty company filed a plea setting up that it was unlawful for the fertilizer company to operate a gin after the passage of chapter 162, Laws 1914, but withdrew the plea though it moved to strike out the evidence and grant it a peremptory instruction, basing the statute as a ground therefor. In such case the court had a right to treat the defense as having been abandoned with the withdrawal of the plea.

APPEAL from circuit court of Jones county.

HON. P. B. JOHNSON, Judge.

Suit by the Laurel Oil & Fertilizer Company against the Maryland Casualty Company and others. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*Chas. R. Shannon*, for appellant.

The Maryland Casualty Company filed its demurrer to the declaration in which it set out the following cause of demurrer: "First: Said declaration does not show that the money or property that plaintiff claims to have lost while in the possession of the said B. C. Cook, and for which loss plaintiff claims that the defendant is legally liable, was sustained by reason of any act or acts constituting larceny or embezzlement, committed by the said B. C. Cook."

We contend here, and also contended in the lower court, in behalf of the Maryland Casualty Company, that the plaintiff in its declaration should allege that the loss for which plaintiff has brought suit, was sustained by reason of act or acts constituting larceny or embezzlement, committed by said B. C. Cook. That it was not only necessary for the plaintiff to make these allegations in its declaration, but that it should have also made the proper proof.

A loss by carelessness or inattention to business might be the foundation of a just claim against said Cook by the Laurel Oil & Fertilizer Company, but it would certainly impose no liability on the Maryland Casualty Company, by the terms of the bond sued on.

This question was gone into quite fully in the case of *Monongahela Coal Co. v. Fidelity & Deposit Co. of Maryland*, decided by the United States circuit court of appeals for the Fifth circuit court district, and which is reported in the 94th Federal Reporter on page 732.

After the court overruled the demurrer of the defendant, Maryland Casualty Company to the declaration filed, by the plaintiff, it, the Maryland Casualty Company, filed a plea of general issue, also eight special pleas to the declaration.

The plaintiff, interposed its demurrer to the fourth special plea filed by this appellant, which set out the following condition of the bond, and breach of the same by appellee: "That the employer shall, if required by the company, and at the expense of the company, use all diligence in prosecuting any employee guilty of an act entailing liability upon the company under this bond, civilly or criminally, as may be allowed under sustained loss, and give all information at its disposal, and all assistance in its power to assist and aid the company in any suit brought by the company to obtain reimbursement from the employee or his estate or any one else in the premises, for moneys which the company may have paid or become liable to pay by virtue of this bond."

The plea further set out a written notice served on the appellee requesting it to comply with the terms and conditions of the bond, and immediately lay information before the proper officials for the arrest of Mr. Cook, if appellee claimed any loss under the bond by virtue of his acts constituting larceny and embezzlement. The plaintiff interposed a demurrer to this fourth special plea, which was in these words:

"1st. Because that part of said indemnity bond set out in the fourth special plea is contrary to law and public policy, and is therefore void and of no effect and not binding upon this plaintiff. 2nd. That even if the

said clause set out is binding upon this plaintiff, it does not require him to prosecute this employee, B. C. Cook criminally, but only requires that the Laurel Oil & Fertilizer Company, the plaintiff, give such assistance and information to the defendant as it has at its disposal. 3rd. Because the plea sets up no defense known to law. 4th. For other grounds to be assigned on the hearing hereof."

The court sustained said demurrer of plaintiff to this defendant's fourth special plea, and dismissed the fourth special plea, to which action of the court this defendant excepted, and has assigned as one of the errors of the court on the trial of the case in the court below. We fail to see how the agreement in this policy made by the appellee with the appellant to prosecute the employee, who had caused the loss by his acts of larceny and embezzlement, should be contrary to public policy, or in violation of law, as set out in plaintiff's demurrer to the fourth special plea of this defendant. *London Guaranty Co. v. Fearnley*, L. R. 5, Cas. 911; *Union Pacific Tea Company v. Union Surety Company etc. Co.*, 36 N. Y. Suppl. 486; 14 R. C. L., page 144, note 14.

*A. B. Schaubert*, for appellant, Cook.

We think the facts set out here are clearly in violation of chapter 162 of the Laws of Mississippi of 1914, part of which is as follow:

"Section 11. Be it enacted by the legislature of the state of Misissippi, that it shall be unlawful for any corporation created under the laws of this state, or authorized to do any local business in the state under the laws thereof to own, buy, lease, rent or otherwise acquire any cotton gin or any interest therein or to manage, use, control or operate the same, where such corporation is now, or may hereafter become interested in, the opera-

tion, ownership, management, control or participate in the manufacture of any cotton seed oil, or any its products; or in the manufacture of cotton seed meal, hulls or other cotton seed products or by-products, or which owns, operates, manages or in any manner controls or has any interest in any compress business concern or coroporation."

The penalty fixed by this act for the violation of the same is a fine of not less than one hundred dollars or more than five thousand dollars. There is also an exception set out in said act, which is as follows: "A concern prohibited by this act from owning or operating gins is at liberty to dispose of said gins for cash or credit within a reasonable time after the passage of this act, and to operate such gins until sold within such time."

This act was approved March 28, 1914, and was to take effect and be in force from and after its passage. If there is any one proposition of law definitely settled in this state, we think it is that contracts that are made in violation of law, or violation of statute prohibiting the same; regardless of whether there is a penalty attached to the statute or not, are null and void. In the case of *Quartette Music Co. v. Haygood et al*, decided by this court on February 5, 1915, reported in 67 So. 311, Mr. Justice Cook quotes with approval the decision of this court in the case of *Bohn v. Lowery*, 77 Miss. 427, as follows:

"Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the defaulter because a penalty implies a prohibition, though there are no prohibitory words in the statute." *Woodson v. Hopkins*, 85 Miss. 171, 37 So. 1000, 38 So. 298. 70 L. R. A. 645, 107 Am. St. Rep. 275.

It is true that under the exception set out in chapter 162 of the Laws of 1914, an oil mill is permitted to operate gins that it owns until it has had reasonable time to dispose of the same, still the exception does not permit an oil mill to lease and operate a gin it does not own after the passage of said act, as is shown by the testimony, was done by appellee in this case. We respectfully submit that for this reason the court should have excluded the testimony offered by the plaintiff and directed the jury to find for appellant, B. C. Cook.

*W. J. Pack*, for appellee.

While appellant assigns many grounds of error in his assignment of error, he stresses but five points in his brief and we will undertake to discuss them in the order in which they appear in his brief.

(1) That the declaration does not sufficiently charge that Cook was guilty of larceny or embezzlement. A mere reading of the declaration we take it, will be a complete answer to this point. We submit that not only does the declaration amply charge that a loss was sustained by embezzlement but that the proof is sufficient to make out a *prima-facia* case of embezzlement under note "E" of the case of *First National Bank v. Fidelity Insurance Company*, 100 American State Report, page 786; *Champion Ice, etc. Company v. American Bonding, etc. Company*, 25 Ky. Law Report 239, 75 S. W. 196; *City Trust, etc. Company v. American Bonding etc., Company*, 25 Ky. Law Reports 239, 75 S. W. 196; *City Trust, etc., Company v. Lee*, 204 Ill. 69, 68 N. E. 485.

(2) Did the lower court err in sustaining plaintiff's demurrer to the fourth special plea which challenged the right of plaintiff to maintain this suit because no affidavit was made against Cook?

The policy is a contract that the authorities have held to be an insurance contract. It has been held: That the general principle governing the older forms of insurance

losses, as fire, marine, and life are applicable to this more modern form of insurance." *People v. Fidelity & Casualty Company*, 143 Ill. 25, 38 N. E. 752, 26, L. R. A. 295; *People v. Rose*, 174 Ill. 310, 49 L. R. A. 124. In the exhaustive note found on page 774 of 100 American State Report under the title, Fidelity Insurance, the rule is laid down and supported by many authorities there cited. "That courts have adopted even a more liberal policy in upholding a contract avoiding the technicalities of construction that have to some extent, been unfavorable to the proper interpretation of other contracts of insurance." And also that: "If looking to all the provisions of the bond, it is fairly and reasonably susceptible of two considerations, one favorable and the other unfavorable to the Insurance Company, the latter is to be adopted for the reason that the instrument was drawn by the attorneys, officers or agents of the Insurance Company; ambiguities must be construed most strongly, against the insurer." Considering this point raised in the case and looking at the policy as drawn by appellant or its agents or attorneys, what must have been the intention of appellant when this part of the policy was drawn? Was it that as a condition precedent to a suit upon the bond, that the insured should actually lodge an affidavit against the employee charging him with larceny or embezzlement, or that it should do as the policy really contemplated, to wit: "Assist in prosecuting the employee."

In order that the substance of each and every paragraph of the bond might be succinctly stated and easily understood by its customers, the writer of the bond had printed upon the margin thereof the caption of what was contained in each paragraph and opposite the paragraph now in question we find the following words: "Employer to assist in prosecuting employee." The demurrer to the special plea raised the point that the plea went further than the requirement of the bond,

and that a fair interpretation of the bond only required the appellee to assist the appellant in the prosecution of the employee, and upon the trial of the case the proof showed that the appellant first resorted to one excuse and then another for its refusal to make good the bond. The exhibit to said special plea, Record 35, shows that appellant was demanding of appellee, before the payment of the bond, or even consider its payment, should do even more than the bond required it to do, to wit: "Lay information before proper officials for the arrest of Mr. Cook." It was using this as a double club with which to beat back appellee in pursuing its remedy upon this bond. Said exhibit, made a part of said special plea shows that although defendant denied liability upon said bond it still wanted as a condition precedent that Cook be arrested. Complying with the conditions of the bond to make proof of affidavit, etc., of the loss, appellee had submitted its proof and was met with the statement as shown in said exhibit. "We have advised you that this proof does not evidence a loss coming under the terms and conditions of our bond; even though it might be conceded that said requirement in the bond is not against public policy, yet, since said appellee went further than the bond itself, upon a fair interpretation, the court was warranted in sustaining the demurrer upon other grounds.

ETHRIDGE, J., delivered the opinion of the court.

The Laurel Oil & Fertilizer Company manufactures cottonseed oil and meal in Laurel, Miss., and maintains agencies for the buying and selling of its products in other places. Among the places at which it maintains an agency is Bassfield, in Jefferson Davis county, Miss., where, in 1914, it operated a cotton gin and sold hulls, cottonseed meal, and phosphates, and exchanged such products for cottonseed, and ginned and wrapped cotton for hire.

Among the employees of this company was B. C. Cook, who was manager of its gin and its agent at Bassfield. The Laurel Oil & Fertilizer Company took out an indemnity policy with the appellant the Maryland Casualty Company, and among other employees whose fidelity was guaranteed was the defendant B. C. Cook. The policy as written provided that the insurance company, the appellant, would indemnify and reimburse the employer, the appellant, for all loss of money, securities, or other personal property of the employer which shall have been sustained by reason of any act or acts constituting larceny or embezzlement by any employee for which the insurance company is surety. It further provides that the employer shall, if so required by the company, and at the cost and expense of the company, use all diligence in prosecuting any employee guilty of an act entailing liability upon the company, civilly or criminally, as may be allowed under the existing laws, and to give all information at its disposal and all of the assistance in its power to bring the employee to justice, and to aid the company in any suit brought by the company to obtain reimbursement from the employee or any one else in the premises for moneys which the company may have paid or become liable to pay by virtue of the bond. It was further provided that if at any time during the life of the bond the employer shall discover or in any way learn of any act or fact or receive any information tending to indicate that any employee is or may be intemperate, or that any employee may be gambling or indulging in other vices, the employer shall immediately give notice thereof by letter addressed to the company; that any condoning of any such acts, or compromise of any loss shall not be made by the employer without the written consent of the company, and that the company shall not be liable for any loss subsequently incurred through the act of such employee, unless the company shall consent in writing. As an exhibit to the declaration was an itemized account of the money sought to be recovered, for cash, meal, and phosphate, bagging



and ties, and gin and bagging tie fees. The declaration alleged that two thousand and forty-six dollars was furnished the employee Cook, and that only one thousand eight hundred and twenty five dollars and twenty-seven cents was accounted for; that Cook had converted the balance to his own use, and demand had been made upon Cook for the money, which he had failed to pay.

The defendants demurred to the declaration, which demurrer was overruled, and pleaded the general issue and numerous special pleas. Among the special pleas filed the third alleged that the application for the bond for Cook contained a question to explain fully the duties of the said employee, and that the answer to this question was "Agent for the purchase of seed and handling our products;" and that the insurance company had no knowledge of the defendant's managing a gin or operating a gin in addition to the duties described in the application. To this plea it was replied that the operation of the gin was a mere incident to occupy the time of Cook while acting as agent and handling the plaintiff's products at Bassfield, and only required a small portion of his time. The fourth plea alleged that the contract of indemnity contained a warranty providing that "the employer shall, if so required by the company and at the cost and expense of the company, use all diligence in prosecuting any employee guilty of an act entailing liability upon the company under this bond, civilly or criminally as may be allowed under the existing laws, and give all information at its disposal and all the assistance in its power to bring the employee to justice, and to aid the company in any suit brought by the company to obtain reimbursement from the employee or his estate, or any one else in the premises, for moneys which the company may have paid or become liable to pay by virtue of this bond," and that the Casualty Company made written request of the Laurel Oil & Fertilizer Company to prosecute at the cost and expense of the casualty company the said Cook for any act of larceny or

embezzlement under its contract, and that the said Laurel Oil & Fertilizer Company declined to prefer charges and prosecute the said Cook criminally, when requested so to do by the appellant casualty company. The plaintiff demurred to this special plea on the ground that this provision was contrary to public policy and void, and that the clause referred to does not require the plaintiff, appellee, to prosecute Cook criminally, but only requires the company to give such assistance and information to the defendant as it has at its disposal. The manager for appellee testified to furnishing Cook with certain supplies and moneys contained in the account made an exhibit to the declaration, and testifies that Cook did not pay for the supplies furnished, and that Cook admitted that the account for two hundred and twenty dollars and seventy-three cents was correct. The manager did not testify to any act or fact that showed that Cook had actually converted to his own use the property consigned to him, but merely testified that he admitted the charge or amount due under the account was correct, but did not testify that he confessed to any embezzlement or larceny or the personal taking for his own use of property of the company. The traveling representative of the Oil & Fertilizer Company went to Bassfield and checked over the accounts with Cook, and procured Cook to sign a statement that the account exhibited was true and correct; but neither the manager nor the traveling representative testified to any act showing that Cook actually used or converted any of the money to his own use, or that he made any confession of theft or embezzlement; the traveling representative merely stating that Cook said he could not account for the difference; that he thought he was entitled to some credits. Cook testified that he was not a bookkeeper and that he did not know whether the accounts of goods shipped him was correct or not, but he testified that on one occasion the building where the products of the appellee were stored was broken into and some of the products carried away. He

further testifies that he did not have sufficient help to run the gin and wait on customers, and that on some occasions he permitted customers to load their own wagons and weigh them, and that in certain instances the bagging for wrapping cotton would overlap or become torn and have to be replaced, and that this occasioned some shortage. In this attitude of the record the circuit court granted a peremptory instruction for the Laurel Oil & Fertilizer Company, except as to seven dollars and fifty cents embraced in the account, which the proof showed was furnished to Cook's wife.

We think there was error in granting this peremptory instruction, because, if Cook's testimony was true, a shortage did not come about by any act of larceny or embezzlement on the part of Cook.

The court also committed error in excluding certain testimony offered by witness Cook, stating that he had not embezzled or stolen any of the property.

We think it was error to sustain the demurrer to the plea of defendant that the Oil & Fertilizer Company refused to file an information and prosecute Cook, though requested in writing by the Casualty Company to do so. It is not contrary to the public policy of this state for a citizen to make an affidavit charging another citizen with crime who is guilty thereof. It is rather the public policy of this state to have crime prosecuted, and each citizen of the state has a right to make an affidavit of any offense against the public law coming to his knowledge. It certainly is not contrary to public policy to prosecute criminals, and it is a reasonable contract where one party is insuring against acts constituting larceny or embezzlement to stipulate that the assured shall give information and institute prosecutions, where required to do so, of all offenses on the part of the employee insured against.

We do not deem it necessary in this case to pass upon the question whether it was lawful for the Laurel Oil & Fertilizer Company to operate a gin after the passage of

chapter 162, Laws of 1914, nor what effect that law would have upon the contract rights in a suit of this kind. The appellant filed a plea setting up these facts, but withdrew the plea, and though he made the motion to strike out the evidence and grant a peremptory instruction, basing this as a ground therefor, we think the court had a right to treat this defense as having been abandoned with the withdrawal of the plea. If the plea had remained in the file and been insisted upon, it might have been answered, and certain testimony might have been introduced which would not be relevant under the issues made by the present pleadings.

For the errors indicated, the judgment will be reversed, and the cause remanded.

*Reversed and remanded.*

---

JONES v. MISSISSIPPI FARMS Co.

[76 South. 880, In Banc.]

1. DAMAGES. *Provisions for liquidated damages.*

Under a contract for the sale of a railroad providing, that time was of the essence of the contract, that it was to be taken strictly and literally, that on the event of failure to make installment payment strickly and promptly, the contract should be null and void, the rights of the purchaser to cease at once *ipso facto*, that the property should revert and immediately reinvest in the seller, without any declaration of forfeiture or act of re-entry and without any other act, as fully and perfectly as if the contract had never been made, and that the moneys paid should be held absolutely as liquidated damages for the purchaser's breach. In such case the moneys paid under the contract by the purchaser before his refusal to continue were liquidated damages and not a penalty.

2. CONSTITUTIONAL LAW. *Right to contract. Fourteenth amendment.*

It is fundamental that the right to make contracts pertaining to business is one of the rights guaranteed by the law of the land, and especially the fourteenth amendment to the Constitution of the United States.

3. **CONTRACTS.** *Absence of modification. Enforcement.*

Unless the parties dealing with the subject-matter by their conduct modify or change the contract originally made, or so act in reference to it as to make it inconsistent for a party to claim or rely upon the contract contrary to its agreement and stipulations, it must be enforced as written.

4. **DAMAGES.** *Liquidated damages or penalty.*

In construing a contract to determine whether a clause calls for liquidated damages or a penalty, the intention of the parties is the thing the court is anxious to ascertain and give effect to.

5. **SAME.**

The general rule is that the intention of the parties must be drawn from the words of the whole contract, and if viewing the language used, it is clear and explicit, then the court must give effect to the contract unless it contravenes public policy. If the language is doubtful, the court will look to the surroundings of the parties and to the construction placed upon the contract by the parties during its existence in order to learn the intention of the parties.

6. **DAMAGES.** *Liquidated damages or penalty.*

In considering whether or not damages stipulated for as liquidated damages was intended by the parties really to be paid, if not disproportionate to the damages that might probably result from a violation of a contract, it will be held to be liquidated damages. If the contract is for the performance of a specific act for the nonperformance of which damages could easily be ascertained, then it may be treated as a penalty.

7. **SPECIFIC PERFORMANCE.** *Contract requiring superintendence of court.*

Equity will not direct a specific performance of a contract where it would require constant superintendence of the court from day to day for an indefinite time in order to enforce the carrying out of its decrees.

8. **CONTRACTS.** *Breach. Recovery by corporation not party.*

A corporation not a party to a contract cannot recover for its breach the damages it may have suffered therefrom; if it can recover anything, it is only as assignee of a party to the contract.

9. **CORPORATIONS.** *Exceeding charter powers. Recovery of damages.*

A foreign corporation which had no charter power to make a contract for the development of cut over timber lands cannot maintain a suit for damages for breach of a contract to purchase a railroad from it, ancillary to the development scheme, except as the damages are stipulated in the contract.

APPEAL from the chancery court of Harrison county.

HON. W. M. DENNY, JR., Chancellor.

Suit by the Mississippi Farms Company against J. T. Jones. From a judgment for plaintiff, both sides appeal.

On the 8th day of May, 1909, Finkbine Lumber Company, a corporation of Iowa, doing business at Wiggins, Miss., and owning a lumber railroad extending from Wiggins about twenty-four miles southeast, entered into a contract with J. T. Jones for the sale of the logging railroad; J. T. Jones being the owner of the majority of the capital stock of the Gulf & Ship Island Railroad, which said railroad was intersected by the logging railroad at Wiggins, Miss. The contract provided for the sale of the road at and for the sum of two hundred and twenty-five thousand dollars, thirty thousand dollars of which was paid in cash, and fifteen thousand dollars to be paid on the 10th day of January, 1910, and fifteen thousand dollars on the 10th day of January of each and every year thereafter until the full purchase price had been paid. The contract consisted of twelve paragraphs, but in substance the contract provided: That the Finkbine Lumber Company should have the use of the said road free of toll in the transportation of its commodities, supplies, officers, servants, and employees with its own engines and cars and train crews as long as it should maintain its sawmills and planing mills or any of them upon the main line of the road and until all the timber then owned or thereafter acquired by the said Finkbine Lumber Company was exhausted, and to make and maintain connections, spurs, and laterals at such places as it might find needful or convenient in the conduct of its business, and that, as the operation of the logging road might not be begun by Jones for some time after the execution of the contract, the Finkbine Company should maintain at its own cost and keep the main line with bridges, culverts, etc., in repair, but that, whenever Jones began to use the main line road for the op-

eration of trains, then the cost of maintaining and repairing the bed and track of the main line, other than the cost of steel, shall be paid by the parties in proportion to the amounts of tonnage carried by each, but provided that the Finkbine Company should not be bound to maintain and repair the main line after it had discontinued the use thereof, but that such use should not be discontinued until it had given Jones at least six months' notice of its purpose to do so; that from the time Jones began the use of the said main line for the operation of trains the Finkbine Company should be under the reasonable direction of the train dispatcher or other officer of Jones in the operation of its trains and that, if Finkbine Company disobeyed any such reasonable rules and regulations made by Jones after such use was begun by Jones, it should be liable for any injuries caused thereby and that each of the parties should, when using said roads, exercise due care in the selection of engines, cars, equipment, and servants, and that Jones should be liable to the Finkbine Company for all negligent and tortious acts of Jones' employees, and should hold Finkbine Company harmless from such negligence of such employees; that no interest should be charged upon the deferred installments of the consideration until Jones began the use of the road but thereafter such deferred payments should bear four per cent. per annum interest. The contract also provided for a system of accounting between the parties, and that when Jones paid the purchase money the Finkbine Company should execute conveyances for the said logging road. Then follows clause 11 of the contract, which reads as follows:

"11. In event the party of the second part shall fail to make payments to the party of the first part, as above provided, or any of them punctually and upon the times above limited strictly and literally, the said times of payments and each of them being the essence of this contract, then and in any such event this contract shall be null and

void, and thereupon all rights and interest thereby granted to or then existing in favor of the party of the second part shall utterly cease and determine, and the property hereby sold, together with all improvements and betterments thereof shall immediately revert and reinvest in the party of the first part, without any declaration or forfeiture or act of re-entry and without any other act of the party of the first part to be performed, and without any right of the party of the second part of reclamation or compensation for moneys paid or improvements made hereunder or upon said property as absolutely and perfectly as if this contract had never been made. It being the intention that said payments and improvements shall be held by the party of the first part absolutely as liquidated damages for the breach of this contract."

By section 12 of the contract it is provided that the term "party of the first part" shall be applied to and include the successors and assigns of the Finkbine Company, and that the party of the second part should include the assigns, heirs, and legal representatives of Jones. This contract seems to have been in furtherance of a scheme of colonization and development of the territory contiguous to Wiggins, Miss., and contemplated that the Finkbine Company should sell and develop cut-over lands owned by it along and contiguous to the logging railroad and to the Gulf & Ship Island Railroad. Considerable correspondence passed and also personal conferences concerning the development project between J. A. Jones, the son of J. T. Jones, and the manager of the Finkbine Company.

On March 9, 1911, a supplemental contract was entered into between J. T. Jones and the Finkbine Company, in which it was provided that, whereas the contract of May 8, 1909, had fixed no time for the commencement of the operation of the said road by Jones, in consideration of the other contract and of one dollar each to the other in hand paid and receipt acknowledged, it was agreed that



Jones shall within six months after receiving written notice from the Finkbine Company of its discontinuance of the operation of the main-line logging road, and upon the vacation of the road by the Finkbine Company, Jones will within six months equip, maintain, and operate said main line road from Wiggins to Tiger Branch for a period of three years, and during the said time run at least one train each way daily, except Sunday, carrying passengers, and furnish such facilities for the transportation of freight as in the judgment of Jones may be required, and that the Finkbine Company was not bound to maintain the roadbed, ties, culverts, or any portion thereof after it should cease to use said road, and provided that, whereas Finkbine Company has ceased to use the east twelve miles of the main line of the logging road, and it was desirable to maintain thereafter until such times as Jones could enter upon the operation, the Finkbine Company would employ such labor and furnish such material as may be necessary to maintain the east twelve miles of such line, keeping an account thereof, and that the same would be paid by Jones in monthly sums not to exceed two hundred and fifty dollars per month. And it was further provided that this contract shall not alter or affect in any respect any of the provisions of the said contract of May 8, 1909, except as specifically stated. The Finkbine Company not having abandoned the use of said road, and Jones not having begun the operation thereof on the 5th day of September, 1913, Jones wrote to Finkbine Company giving notice that on the next period for payment he would default and decline to make any further payment on the contract, having paid at that time a total amounting to one hundred and two thousand dollars. This letter, in full, is as follows:

“It will be some time until the payment becomes due, the failure to meet which would, by the terms of the contract render it null and void, but thinking that you are entitled to notice of my intention in that respect I wish

to advise you that I will make no further payments upon the contract executed on the 8th day of May, A. D. 1909, and that consequently you may now consider that contract, together with the agreements supplementary thereto, dated respectively the 8th day of March, A. D. 1911, and October 26, A. D. 1911, canceled and henceforth inoperative. Of course the property about which the agreements were made now reverts to you."

To this letter Finkbine Company replied as follows:

"Your letter of September 23d came duly to hand, but inasmuch as our Mr. W. E. Guild was absent from the city we have withheld answer to same until his return.

"We are sorry that you do not look at this matter the same way as we do, as we feel assured that our view of it is correct. We realize that you have a perfect right to stop payment on the road that you bought, but we are sure that you have not a right to refuse to operate the road for three years from the time we gave notice of turning it over to you as stated explicitly in the secondary contract, and we must reiterate what we said in a previous letter in regard to your operating the road."

Jones refused to make the payment, and the Finkbine Company insisted that he should make the payment. The Finkbine Lumber Company after the execution of the contract of May 8, 1909, and before the operating contract of 1911, caused the Mississippi Farms Company to be organized for the purpose of carrying out a development scheme contemplated by the parties; the Finkbine Lumber Company having no charter power to engage in buying and selling lands generally and in farming and developing them. It sold its entire holdings to the Mississippi Farms Company at an average price of six dollars per acre. The Mississippi Farms Company was created by declaring a stock dividend of the Finkbine Company and organizing the stockholders, to whom his stock dividend was given, into a corporation called the

Mississippi Farms Company. After the refusal of Jones to carry out the contract, Finkbine Lumber Company assigned its contracts with Jones to the Mississippi Farms Company, and the Mississippi Farms Company filed suit in the chancery court of Harrison county on the 1st day of August, 1914, setting out the contracts between the Finkbine Lumber Company and J. T. Jones and the assignment of said contracts to it, and for damages incurred or sustained by the Mississippi Farms Company by reason of its buying the lands from the Finkbine Company, and also from other parties, in undertaking to carry out the development scheme contemplated by the Finkbine Company and J. T. Jones. It appears that the Mississippi Farms Company at considerable expense advertised farm lands and induced certain Slavs and Poles residing in the north to move to Mississippi, selling lands along the lines of the logging road to such people at an average price of twenty-six dollars per acre. It appears that the colonization scheme was a failure, and that the Slavs and Poles failed to make good and abandoned their contracts for the payment of the land and moved away.

On the hearing the chancellor declined to decree specific performance except to render a judgment against J. T. Jones for the balance of the purchase money under the contract of May 8, 1909, and the supplemental contract or contract involving an additional two miles of the road, but decreed in lieu of specific performance damages in the sum of sixty thousand dollars. From this judgment both complainant and defendant in the court below appeal.

*R. E. Eaton, Mayes, Wells, May & Sanders and Mayes & Mayes*, for appellant.

*Green & Green and White & Ford*, for appellee.

ETHRIDGE, J., delivered the opinion of the court.

(After stating the facts as above.) The direct appeal is prosecuted by J. T. Jones, and he contends that under clause 11 above set out he was not compelled to perform the contract, but had the option of retiring at any time he saw proper, and that clause 11 at all events fixed the damages which should be paid for a default in the contract. He contends further that the Mississippi Farms Company, not being a party to the contract, can recover no damages suffered by it by reason of the failure of Jones to carry out the contract to buy and operate the railroad. The Farms Company claims that it is not only entitled to a decree for the balance of the purchase money of the road, but that it is entitled to damages for moneys expended, and profits lost, by it in carrying out the development scheme or undertaking to do so contemplated by Jones and the Finkbine Company.

It appears to us that clause 11 of the contract was made with the view of fixing damages for the failure to carry out this contract, and that the moneys paid under this contract are to be considered as liquidated damages and not as a penalty. Under this clause, it is declared by the parties that time is the essence of this contract, and that it is to be taken strictly and literally; and that, upon the event of the failure to make the payment strictly and promptly as of the date, the contract is to be null and void and the rights of Jones were to cease at once *ipso facto*, and the property should revert and immediately reinvest in the Finkbine Company without any declaration or forfeiture or act of re-entry and without any other act to be performed by it, as fully and as perfectly as if the contract had never been made; and that the moneys paid should be held absolutely as liquidated damages for the breach of the contract. It is difficult to conceive of how any stronger contract could be made than the one that is here made bearing upon this matter.

It is fundamental that the right to make contracts pertaining to business is one of the rights guaranteed by the law of the land, and especially the fourteenth amendment to the Constitution of the United States. Unless the parties dealing with the subject-matter by their conduct modify or change the contract originally made, or so act in reference to it as to make it inconsistent for a party to claim or rely upon the contract contrary to its agreement and stipulations, it must be enforced as written. To quote from the United States supreme court in *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818:

“The parties in this case, in words too distinct to leave room for construction, not only specify the time when each condition is to be performed, but declare that ‘time and punctuality are material and essential ingredients’ in the contract; and that it must be ‘strictly and literally’ executed. However harsh or exacting its terms may be, as to the appellee, they do not contravene public policy; and therefore a refusal of the court to give effect to them, according to the real intention of the parties, is to make a contract for them which they have not chosen to make for themselves”—citing authorities.

In the headnotes to this case in the Law Edition report these principles are stated as follows:

“Time may be made of the essence of the contract by the express stipulations of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser.

“Where the parties specify the time of performance, and declare that ‘time and punctuality are material and essential ingredients’ in the contract, and that it must be ‘strictly and literally’ executed, however harsh or exacting its terms may be, a refusal of the court to give effect to them is to make a contract which the parties have not made for themselves.”

The United States supreme court has recognized these principles in numerous other cases, among which I cite the following: *Taylor v. Longworth*, 14 Pet. 172, 10 L. Ed. 405; *Secombe v. Steele*, 20 How. 94, 15 L. Ed. 833; *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479. See also *Slater v. Emerson*, 19 How. 224, 15 L. Ed. 626, *Bank of Columbia v. Hagner*, 1 Pet. 455, 7 L. Ed. 219, *Heppurn & Dundas v. Colin Auld, etc.*, 5 Cranch, 262, 3 L. Ed. 96. That time will be regarded as the essence of the contract when stipulated by the parties by distinct agreement is well settled in numerous state authorities. *Davis v. Isenstein*, 257 Ill. 260, 100 N. E. 940, 45 L. R. A. (N. S.) 52; *Heckman's Estate*, 236 Pa. 193, 84 Atl. 689; *Hahn v. Concordia Society*, 42 Md. 460; *Bodina v. Glading*, 21 Pa. 50, 59 Am. Dec. 749; *St. Mary's Church v. Stockton*, 8 N. J. Eq. 520; *Webster v. Bosanquet*, Ann. Cas. 1912C, 1019; *Phelps v. I. C. R. R. Co.*, 63 Ill. 468; *Stow v. Russell*, 36 Ill. 18; *Heckard v. Sayre*, 34 Ill. 142; *Steele v. Biggs*, 22 Ill. 643; *Chrisman v. Miller*, 21 Ill. 227; *Ewing v. Crouse*, 6 Ind. 312; *Foot v. Rush*, 100 Iowa, 522, 69 N. W. 874; *Carter v. Walters*, 91 Iowa, 727, 59 N. W. 201; *Garcin v. Pennsylvania Furnace Co.*, 186 Mass. 405, 71 N. E. 793; *Judd v. Skidmore*, 33 Minn. 140, 22 N. W. 183; *Jewett v. Black*, 60 Neb. 173, 82 N. W. 375; *Brown v. Ulrick*, 48 Neb. 409, 67 N. W. 168; *Patterson v. Murphy*, 41 Neb. 818, 60 N. W. 1. In the case of *Webster v. Bosanquet*, *supra*, we quote from the headnote as follows:

"Where a contract provides that on breach thereof a specified amount should be paid 'as liquidated damages and not as a penalty,' its true construction must have regard to the particular circumstances of the case, and not be such as to render it unconscionable and extravagant. Where it is impossible at the date of contract to foresee the extent of uncertain injury which might be sustained by its breach, or the cost and difficulty of providing

it, and the amount is reasonable, it should be recovered as liquidated damages.”

Are there any such surroundings and circumstances in the present case as would warrant us in construing the stipulation of the contract contained in clause 11 as a penalty and not as liquidated damages within the meaning of the rule laid down in this case? When we take the surroundings of the parties into consideration and consider the uncertainty of the venture about which the parties were contracting and the extreme difficulty of proving damages in the case of a failure, it becomes manifest that the parties were themselves fixing what the damages should be. In the case of Jones' failure to pay for the logging road, the Finkbine Company would have all the property which it had conveyed to Jones, and, in addition thereto whatever Jones had paid to it, the cash payment being thirty thousand dollars, and fifteen thousand dollars, additional accruing each year thereafter as the payments were made. Both Jones and the lumber company were persons experienced in business matters and well knew the uncertainty of a venture of this kind. They took particular pains to make their intentions manifest that the contract was to be terminated at once in case of default and that this amount so paid would be the exact amount of damages that would be suffered from such breach.

Of course, the intention of the parties is the thing the court is anxious to ascertain and give effect to. The general rule is that the intention of the parties must be drawn from the words of the whole contract, and if, viewing the language used, it is clear and explicit, then the court must give effect to this contract unless it contravenes public policy, if the language is doubtful, the court will look to the surroundings of the parties and to the construction placed upon the contract by the parties during its existence in order to learn the intention of the parties.

In considering whether or not damages stipulated for as liquidated damages was intended by the parties really

to be paid if not disproportionate to the damages that might probably result from a violation of a contract, it will be held to be liquidated damages. If the contract is for the performance of a specific act for the nonperformance of which damages could easily be ascertained, then it may be treated as a penalty. The whole subject is treated in a case note to Ann. Cas. 1912C, 1021-1028. See, also, *Selby v. Matson*, 137 Iowa, 97, 114 N. W. 609, 14 L. R. A. (N. S.) 1210; *Morrison v. Ashburn* (Tex. Civ. App.) 21 S. W. 993; *Lightner v. Menzel*, 35 Cal. 452; *Dakin v. Williams*, 17 Wend. (N. Y.) 447; *Holmes v. Holmes*, 12 Barb. (N. Y.) 137; *Welch et al. v. McDonald*, 85 Va. 500, 8 S. E. 711; *Pettis v. Bloomer*, 21 How. Prac. (N. Y.) 317; *Barnwell v. Kempton*, 22 Kan. 314; *Geiger et al. v. West Maryland R. R. Co.*, 41 M. D. 4; *K. P. Mining Co. v. Jacobson*, 30 Utah, 115, 83 Pac. 728, 4 L. R. A. (N. S.) 755.

On the proposition of compelling the operation for three years in the supplemental contract, our own court has held, in *Sims v. Vanmeter Lumber Co.*, 96 Miss. 449, 51 So. 459, that equity will not direct a specific performance of a contract where it would require constant superintendence of the court from day to day for an indefinite time in order to enforce the carrying out of its decrees. This case refused specific performance of a contract for the construction of a logging road. See, also, *Bomer et al. v. Canaday*, 79 Miss. 222, 30 So. 638, 55 L. R. A. 328, 89 Am. St. Rep. 593.

On the proposition of allowance of damage in lieu of specific performance, we think that the appellees cannot recover because the Mississippi Farms Company, not being a party to the contract, cannot recover from the appellant the damages it may have suffered in its dealings in this respect. If it could recover anything, it would be limited to the recovery of such damages as were suffered by the Finkbine Lumber Company under assignment of Finkbine's contract to the Mississippi Farms Company. The Finkbine Company has not suffered damage, because it



sold its property at an average of six dollars per acre, when the proof shows that its real value is approximately two dollars per acre. The Finkbine Company will be precluded from maintaining suit for damages as to the development project independent of clause 11, because it had no charter power to make a contract as to the development proposition. *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *McCormick v. Market National Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817.

The case is therefore reversed, and bill and cross-bill dismissed.

*Reversed and dismissed.*

STEVENS, J. (dissenting.) In any analysis of the issues in this case, the situation of the contracting parties and all the provisions of the contracts here presented for construction must be clearly understood and kept in mind. For this reason I am setting out the contracts in full and in the chronological order, with a brief statement of their relationship one to the other.

In the year 1909, appellant J. T. Jones owned the capital stock of the Gulf & Ship Island Railroad, and his son, J. A. Jones, was the first vice president of the said railroad company and the attorney in fact of his father, J. T. Jones. The power of attorney was properly evidenced by writing. The management of the Gulf & Ship Island Railroad was under the control of Capt. J. T. Jones, and his voice in all matters of policy was the dominant voice and his judgment the ultimate authority. The Finkbine Lumber Company, while an Iowa Corporation, owned a large sawmill at Wiggins on the line of the said Gulf & Ship Island Railroad, and in the operation of its sawmill business had constructed and owned twenty-four miles of logging road extending Wiggins southeast to Tiger Branch. This logging road had been substantially constructed as a standard

gage railroad with a view of making it some day a common carrier. The Finkbine Company owned approximately twenty-five thousand acres of land, a large part of which had been cut over and which lay contiguous to the said logging railroad. The Gulf & Ship Island Railroad as well as the said logging railroad penetrated the yellow pine belt of South Mississippi, and the Gulf & Ship Island had been obtaining its principal tonnage from the lumber business. As the pine timber was denuded, it was to the advantage of the Gulf & Ship Island Railroad and its owner, Capt. J. T. Jones, to encourage the development of the cut-over pine lands along the line of said railroad. It was also to the interest of Capt. Jones to control the tonnage that might ultimately be derived from or routed over the said logging railroad. The Finkbine Company, on the other hand, desired to consummate a sale of its logging road when the timber holdings of said company had been cut and lumbered. To this end the Finkbine Company had entered into negotiations for a sale of the said road to the Mississippi Central Railroad Company, which was then extending a line southeast from Hattiesburg to some point on the Gulf Coast. It is the theory of the appellee, supported by its testimony, that negotiations were then opened between Capt. J. T. Jones and the Finkbine Company for the purchase of the Finkbine logging road, and that as a matter of policy the logging railroad was bought by Capt. Jones instead of by the Gulf & Ship Island Railroad Company, but in order that the stock held by Capt. Jones in the Gulf & Ship Island Railroad would be more valuable. After several conferences, the following contract was thereupon executed:

“This agreement between the Finkbine Lumber Company, a corporation, hereinafter called the party of the first part, and Joseph T. Jones, hereinafter called the party of the second part, witnesseth:

“1. That the party of the first part, for the considerations and subject to the rights, conditions and reserva-

tions hereinafter expressed, agrees to sell to the party of the second part the main line of the logging railroad, hereinafter called 'main line road' owned by the party of the first part, described as follows, to wit: Beginning at the intersection of the said main line road with the Gulf & Ship Island Railroad at Wiggins, Mississippi, and extending thence continuously and in a southeasterly direction to the stream called Tiger Branch in section 18, township 3 south, range 8 west of St. Stephens Meridian; a distance of about twenty-four miles, together with all of the right of way one hundred feet on each side from the center of the main line road over the land now owned by the Finkbine Lumber Company, together with such other title to right of way as they may now possess (and the said Finkbine Lumber Company, wherever it can do so at a reasonable price, agrees to obtain a right of way of one hundred feet on each side of said main line road) grades, embankments, bridges, culverts, ties and rails of said main line road, but excepting therefrom and reserving to the party of the first part all spurs, laterals, switch tracks, engine house, machine shops, cars, locomotives, machinery, tools and appliances used on said main line road or connected or in connection therewith.

"2. The party of the second part agrees to pay to the party of the first part for said main line road the sum of two hundred and twenty-five thousand dollars (\$225,000) in installments as follows: Thirty thousand (\$30,000) dollars within ——— days after the date of signing of this agreement, and fifteen thousand (\$15,000) dollars on the 10th day of January, A. D. 1910, and fifteen thousand (\$15,000) dollars on the 10th day of January of each and every year thereafter until said consideration is fully paid.

"3. The party of the first part reserves the right, without paying any toll, charge or compensation whatsoever therefor, to use said main line road for the operation of

its trains and the transportation of its commodities, supplies, officers, servants and employees, under and with its own engines, cars and train crews so long as the party of the first part, its successors or assigns shall maintain its sawmills and planing mills or any of them upon or along said main line road at their present location or elsewhere, and until all of the timber now owned or hereafter acquired by the party of the first part tributary to said main line road, or that may be conveniently transported over the same, is exhausted.

“And the party of the first part also reserves the right throughout the entire period during which it shall continue to use said main line road, to make and maintain such connections with said main line road by spurs, laterals and switch tracks, and from time to time change the location thereof, and to remove the same at pleasure, as it may find needful or convenient in the transaction of its business as manufacturers and dealers in lumber, spirits and kindred commodities, but all such changes and removals of spurs, laterals and switch tracks shall be done in a skillful and workmanlike manner, and at such times as will least interfere with the operation of the main line road by the party of the second part. All of the said above and foregoing work to be subject to the approval of the party of the second part, or some suitable person to represent him.

“4. Whereas, the party of the second part may not begin to use said main line road for the operation of trains until some time after the date of the signing of this agreement; therefore in that event it is agreed that until such time as the party of the second part shall begin to use said main line road for the operation of trains that the party of the first part shall, at its own cost, maintain and keep said main line road, with its bridges, culverts, etc., in as good repair as the same is now in, ordinary wear excepted; but whenever the party of the

second part shall begin to use the said main line road for the operation of trains, then and thereafter the cost of repairing and maintaining the bed and track of said main line road, other than the cost of replacing the steel, shall be paid by the parties hereto in such proportion as the amounts of tonnage carried by each of the parties hereto over said main line road bear to the cost of maintaining and repairing the said road, provided however, that in either event the party of the first part shall not be bound to maintain or repair said main line road or any part or parts of it or pay any portion of the cost thereof after the party of the first part shall have discontinued the use thereof, but the party of the first part shall not discontinue the use of said main line road or any part thereof until after it has given the party of the second part at least six months notice of its purpose so to do. It being the intention that the party of the first part shall not pay the cost or any part of the cost of maintaining any part or parts of said main line road of which it has discontinued the use, in the manner provided.

"5. From the time the party of the second part begins to use said main line road for the operation of trains, and during the continuance of the use thereof by the party of the second part, all trains and train crews of the party of the first part shall be under the reasonable direction of the train dispatcher or other properly designated officer of the party of the second part, and the party of the second part, during said period, shall have the right to establish, and the party of the first part, its servants, and employees shall at all times, after due notice thereof, obey such reasonable rules and regulations for the movement of its trains as the party of the second part may make, provided however, that such order of the train dispatcher, or other properly designated officer, and such rules and regulations of the party of the second part shall not interfere with the ex-

peditions movement of the trains and commodities of the party of the first part. It being the intention that said orders, rules and regulations shall be of such character as to fairly and equitably conserve and facilitate the business of each of the parties hereto.

“6. The parties shall each, and at all times during their joint use of the said main line road, exercise such care in the selection of cars, engines and equipment, and in the employment and conduct of servants, and in the operation of trains as will cause as little injury to or delay upon said road as practicable.

“7. The party of the first part shall, as between it and the party of the second part, be liable for all negligent or tortious acts of its servants and employees in the use and operation of said main line road, and shall hold the party of the second part harmless therefrom, provided however, that the party of the first part shall not be liable for any injuries or damages that may arise from the errors or mistakes in the orders of the train dispatcher or other officer of the party of the second part, or from any improvident rules or regulations which the party of the second part may establish.

“The party of the second part shall, as between him and the party of the first part, be responsible for all negligent or tortious acts of his servants and employees in the use and operation of said main line road, and shall hold the party of the first part harmless.

“8. No interest shall be charged upon the deferred installments of the consideration to be paid by the party of the second part to the party of the first part, as above provided, so long as the party of the second part shall not use said main line road for the operation of trains, but after the party of the second part begins the use thereof for the operation of trains, said deferred installments of the consideration shall annually and until paid bear such proportion of four per centum per annum interest, as the tonnage carried by the party of the sec-

ond part over said main line bears to the aggregate amount of tonnage carried by both of the parties hereto.

"9. For the purpose of ascertaining the amount of said interest and the proportions of the expense of maintenance, as above provided, there shall be in January of each year, after party of the second part begins to use said main line road for the operation of trains, an annual accounting between the parties hereto of said tonnage carried by the parties hereto, and each of said matters shall be fully ascertained and paid at that time.

"10. Whenever the party of the second part has paid the full amount of the consideration to the party of the first part, as above provided, and has performed this agreement in all other respects to be performed by him, then the party of the first part shall convey said main line road, sold hereby to the party of the second part, proper instrument or instruments warranting the title held by the party of the first part hereto, but in making the said instrument or instruments, the party of the first part shall only be bound to convey and warrant the fee title to the right of way of said main line road where it owns the fee title, and as to the remainder of the right of way of said main line road it shall only be bound to convey and warrant such easement or easements as it now has or may in the interim acquire.

"11. In event the party of the second part shall fail to make payments to the party of the first part, as above provided, or any of them punctually and upon the times above limited strictly and literally, the said times of payments and each of them being the essence of this contract, then and in any such event this contract shall be null and void, and thereupon all rights and interest thereby granted to or then existing in favor of the party of the second part shall utterly cease and determine, and the property hereby sold, together with all improvements and betterments thereof shall immediately revert and invest in the party of the first part, without any declaration

or forfeiture or act of re-entry and without any other act of the party of the first part to be performed, and without any right of the party of the second part or reclamation or compensation for moneys paid or improvements made hereunder or upon said property as absolutely and perfectly as if this contract had never been made. It being the intention that said payments and improvements shall be held by the party of the first part absolutely as liquidated damages for the breach of this contract.

"12. It is further agreed that the term 'party of the first part,' as hereinbefore used, shall apply to and include the successors and assigns of the Finkbine Lumber Company, and that the term, 'party of the second part,' as hereinbefore used, shall apply to and include the assigns, heirs and legal representatives of said Joseph T. Jones.

"Executed in duplicate this 8th day of May, A. D. 1909.

"FINKBINE LUMBER COMPANY,

"By W. E. GUILD, Treas. and Gen. Mgr.

"JOSEPH T. JONES,

,"By J. A. JONES, Atty. in Fact."

In 1910 the Gulf & Ship Island Railroad Company was actively promoting immigration to and the settlement of South Mississippi. On April 9, 1910, J. A. Jones, its vice president and the one who executed the above contract for his father, addressed a letter to the Finkbine Lumber Company which reads, in part, as follows:

"For a number of reasons it is not only desirable, but necessary for this company to promote the early settlement, by the farmers and others, of unoccupied tillable lands along its main line and branches in South Mississippi.

"The need exists to-day (and it will be of the utmost importance in a very few years) for an increase of traffic from soil products, to take the place of gradual diminishing of forest products, if this company's passenger and



freight train service is to be maintained at its present excellent standard.

"In connection with our traffic department, we have created an immigration bureau with agencies in other states, north and south. . . .

"While we do not anticipate an early or rapid movement of people to our part of the country, the thread of immigration to the South—small as yet—is begining, and if we can encourage these traffic producers to come and till the soil, and do other things of more or less commercial importance, the welfare of all the people owning land and other property in South Mississippi will be greatly enchanced during the next decade. . . .

"It is believed that if we can secure from landowners permission to offer for sale, at reasonable prices and terms, an aggregate of from one hundred and fifty to two hundred and fifty thousand acres nearest to our line, this fact properly advertised at our expense will sooner or later result in the development of South Mississippi to a marked degree, and all concerned will be benefited thereby.

"We therefore respectfully solicit your early and favorable consideration of this subject. . . .

" . . . What we desire is an opportunity to try what can be accomplished as the result of mutual active effort, which should be commenced at once."

In pursuance of this letter, there were personal interviews between representatives of the Finkbine Company and Mr. Jones, and the thing insisted upon by the Finkbine Company was some definite assurance that the logging road theretofore purchased by Capt. Jones would be operated as a common carrier. While Capt. Jones had executed a contract of purchase, there was no definite time fixed in the contract when the road would begin to be operated as a common carrier, and no time stipulated during which it should be maintained by Capt. Jones as

a common carrier. In November, 1910, in answer to this desire and demand of the Finkbine Company, J. A. Jones wrote Mr. W. E. Guild, treasurer of the Finkbine Company, the following letter:

"Dear Sir: I am very much puzzled as to what to do about the proposition that you made concerning the logging road running from Wiggins, and several conversations with Mr. Hale and Judge Neville do not seem to simplify the puzzle. It seems to me, however, that your people will risk absolutely nothing in guaranteeing to the people who purchase your lands that a railroad will be operated over the present logging road, as you and you only, can be sure of the development to take place; in other words, if anybody knows, you know that there will be enough population settled along this road to justify operating it. And once this population and its consequent traffic is established, most assuredly, if you and your friends do not wish to run a railroad there will be no difficulty in finding those that do, if the G. & S. I. were to be so foolish as not to want this road itself.

"Mr. Hale suggests that we might enter into some contractual relations with you, agreeing to operate this road under certain conditions, the main condition being that a certain population or a certain amount of traffic was established or assured. If you care to come down tomorrow, Tuesday, and discuss this matter fully, we will be glad to meet you. Yours truly, J. A. Jones, First Vice President.

After a personal conference then between Mr. Guild and Mr. Jones on December 10, 1910, J. A. Jones addressed to the treasurer of the Finkbine Lumber Company this letter:

"Dear Sir: If your company expends considerable time and money in the development of the farming lands around Wiggins, Miss., and tributary to the Finkbine Lumber Company's logging road, Capt. J. T. Jones is willing to guarantee operation of a railroad over the

present tracks of the Finkbine Lumber Company's logging road for a period of three years after the logging operations cease, said road being about twenty-four miles in length; but he does not wish it understood that he will operate this road if at any time it does not pay its operating expenses for three years."

It is claimed by appellee, as complainant in the court below, that Mr. Guild then went to Des Moines, Iowa, and in conjunction with the other stockholders of the Finkbine Lumber Company organized a corporation with the necessary charter powers to colonize and promote the development of the Finkbine Lumber Company's land in south Mississippi. This accounts for the organization of Mississippi Farms Company, appellee herein, and this company was capitalized by having the Finkbine Lumber Company declare a dividend equal to the value of its principal real estate holdings, twenty-four thousand three hundred and sixty acres of land at a valuation of six dollars per acre. The Finkbine Lumber Company thereupon conveyed these lands to the Farms Company in lieu of payment of dividend in money. Before the Farms Company began its actual development, Mr. Guild wrote Capt. Jones a long letter rehearsing the negotiations up to that point. This letter was written January 11, 1911, and appears to have been prompted by the untimely death of Mr. J. A. Jones on December 24, 1910. In this letter Capt. Jones is told, among other things:

"In order to do this, we would have to have some assurance that the line would be operated in order to have our maps made showing this railroad as being located on the plats. . . . After making this agreement we have gone ahead with our project and organized a company with one hundred and fifty thousand dollars paid-up capital to take over and market all of these lands to actual settlers to develop the land along the lines as we had talked over. . . . We would like very much, Captain, to have a time set whereby

our counsel and yours can meet in Gulfport and arrange all of the details and have the matter finally settled and disposed of. . . . We are developing a demonstration farm just south of Wiggins, along the G. & S. I. track, which will be a great advertising feature for this part of the country, and we propose having a man in charge who can deliver lectures, give information to settlers as to what to grow, how to grow it and when to grow it, as well as to have actual demonstration of this work going on in the field."

On February 14, 1911, Capt. Jones wrote Mr. Guild and addressed him as the president of the Mississippi Farms Company, and in this letter he states in part:

"The farming proposition in Mississippi is an important one at this time, and the future possibilities are great, and this is the position we wish you to reach, for we certainly shall need it in our business to keep up the freights; otherwise, I fear that Mississippi laws will eat up our income and we will have nothing but dilapidated railroads left after the timber is cut off."

After further negotiations, the parties finally met at Gulfport on March 6th and entered into the following contract March 9, 1911, known in this record as the "operating contract." This contract is as follows:

"This agreement between Finkbine Lumber Company, hereinafter called party of the first part, and Joseph T. Jones, hereinafter called party of the second part, witnesseth:

"Whereas, the parties hereto did, on the 8th day of May, 1909, enter into a written contract whereby the party of the first part sold to the party of the second part its main line road from the town of Wiggins, Miss., to Tiger Branch, Miss., as in said contract specifically defined, and

"Whereas, no time was fixed in the said contract for the commencement of the operation of the said road by the party of the second part and it is now deemed advisable that a time therefor be fixed:

"Now therefore, in consideration of the premises and the further consideration of one dollar, each to the other in hand paid the receipt whereof is hereby acknowledged, the parties hereto do each covenant and agree, one with the other, as follows:

"That the party of the second part, by himself or assigns, shall, within six months after receiving written notice from the party of the first part of the discontinuance by it of the operation of the said main line road and upon the vacation of the road by the party of the first part, the party of the second part will, within said six months, equip, maintain and operate the said main line road from the town of Wiggins to Tiger Branch for a period of at least three years, and will, during said three years' period, run at least one train each way daily (Sunday excepted) carrying passengers, and will also furnish such facilities for the transportation of freight as the judgment of the party of the second part may require.

"It is further agreed between the parties hereto that, whereas, under the said contract of May 8, 1909, the party of the first part was not bound to maintain the road bed, ties and culverts, or any portion or portions thereof, after it should cease the use of the same, and

"Whereas, the party of the first part has ceased to use for the carrying of timber or lumber the east twelve miles of said main line road, and it is desirable that the same be maintained hereafter until such time as the party of the second part shall enter upon the operation of the entire main line road:

"Now therefore, in that respect, it is agreed between the parties hereto, that the party of the first part shall employ such labor and furnish such material as may be necessary to maintain the said twelve (12) miles of said main line road, and shall keep a strict account of all money expended for such labor and material, which

expenditures shall not in any event exceed the average sum of two hundred and fifty dollars (\$250) per month, unless specially authorized by the party of the second part; provided, however, that if the entire main line road shall be turned over by the party of the first part to the party of the second part on or before the end of the said two-year period, the party of the first part shall, from the end of the said two years' period until the said road is turned over to him, maintain the east twelve (12) miles of said main line road at its, the party of the first part, own expense. The party of the second part agrees that he will, monthly, upon the rendition by the party of the first part of an itemized statement therefor, repay to the party of the first part the said monthly sum and such additional sums as the party of the second part may specially authorize.

"It is further agreed that this contract shall not alter or affect in any respect any of the provisions of the said contract of May 8, 1909, except as above specifically stated.

"It is further agreed that the term, party of the first part, as hereinbefore used, shall apply to and include the successors and assigns of the Finkbine Lumber Company, and that the term, party of the second part, as hereinbefore used, shall apply to and include the assigns, heirs and legal representatives of the said Joseph T. Jones.

"Executed in duplicate this 8th day of March, A. D. 1911.

"FINKBINE LUMBER COMPANY,

"By W. E. GUILD, Treas. & Gen. Mgr.

"JOSEPH T. JONES."

It will be noted that this contract was executed by Capt. Jones for himself. On October 26, 1911, there was an additional or supplementary contract whereby an additional two miles of road were sold to Capt. Jones. This contract reads:

"This agreement, between Finkbine Lumber Company, 'party of the first part,' and Joseph T. Jones, 'party of the second part,' witnesseth:

"Whereas, the parties hereto did, on May 8, 1909, enter into a certain written contract whereby the party of the first part sold to the party of the second part, its main line road from the town of Wiggins, Miss., to Tiger Branch, Miss., and

"Whereas, on March 8, 1911, the parties hereto entered into a further written supplementary contract, fixing the time for the commencement of the operation of said road by the party of the second part and providing for the maintenance thereof, after the party of the first part should cease to use the same, and

"Whereas, the party of the first part is the owner of two (2) miles of logging road, not included in said contract, but connected with said main line road and extending from Tiger Branch southeasterly into section twenty-one (21), township three (3), range nine (9) west, which it desires to sell to the party of the second part.

"Now, therefore, the parties hereto do covenant and agree each with the other, as follows:

"1. The party of the first part shall and does hereby sell to the party of the second part, the said two (2) miles of logging road, running from Tiger Branch southeasterly into section twenty-one (21), township three (3), range nine (9) west, for the sum of eighteen thousand, seven hundred and fifty dollars (\$18,750), which sum shall be paid by the party of the second part to the party of the first part, as follows:

"Twelve hundred and fifty (1,250) dollars within one hundred and eighty days after the execution of this agreement.

"Twelve hundred and fifty (1,250) dollars on the 10th day of January, 1912, and

"Twelve hundred and fifty (1,250) dollars on the 10th day of January each year thereafter until said consideration is fully paid.

"2. It is further agreed that in all other respects than as to the amount and times of payment of the consideration this agreement shall be governed and controlled by the provisions of the said contracts first above referred to, to the same extent and as fully as if each of the provisions of said contracts (except as to the amount and times of payment of consideration) were herein written as a part hereof.

"Executed in duplicate this 26th day of October, A. D. 1911.

"FINKBINE LUMBER COMPANY.,

"By W. E. GUILD, Treas. & Gen. Mgr.

"JOSEPH T. JONES."

In the meantime the Farms Company was acquiring lands from other parties, expending large sums of money upon its demonstration farms and for general advertising purposes, and was establishing a third corporation known as the "American Pickling & Canning Company." It was also bringing immigrants along the line of its logging road and selling several thousand acres of its lands to settlers. It claims that it made large expenditures and improvements upon the faith of Capt. Jones's letters and the several contracts. This was the *status* of the parties when Capt. Jones, in September, 1913, addressed his letter to the Finkbine Lumber Company declining to make further payments upon the contract whereby he agreed to purchase the logging railroad. The Finkbine Lumber Company by its officials protested at the construction which Capt. Jones placed upon these agreements and insisted upon each of the contracts being executed as agreed upon. The interpretation which Capt. Jones placed upon the contracts and the protest and insistence of the Finkbine Company are fully shown by the correspondence.



This disagreement led to the filing of the bill of complaint in this cause by the Mississippi Farms Company. Prior to the institution of the suit, the Finkbine Lumber Company assigned in writing all its claims under and by virtue of the contracts to the appellee herein, which sues not only for damages alleged to have been sustained by it upon the faith of the contracts and of the assurance of Capt. Jones, both written and oral, but also sues as assignee of the original contracts. With this brief statement of the facts and issues presented by a very voluminous record of several volumes, I proceed to a statement of my views on the law points.

The original contract of May 8, 1909, involving twenty-four miles of the logging railroad, is either an option or a contract of purchase. In law it cannot be a combination of both, and there is in the legal sense no other kind of contract into which it may be construed. If it is a contract of purchase, it follows that Capt. Jones bought a logging railroad on the installment plan, and ought in equity and good conscience to pay for it. No amount of depression in business or disturbance of stock markets should excuse a purchaser from paying the balance of the consideration for that which he has solemnly agreed to buy. Was this, then, a purchase? That is what the contract itself says. Excerpts from the contract are as follows: First party "agrees to sell." Second party "agrees to pay to the party of the first part for said main line road the sum of two hundred and twenty-five thousand dollars." First party "reserves the right to use said main line road for the operation of its trains, etc., and also reserves the right "to make and maintain connections with said main line road by spurs, laterals and switch tracks." Another provision in the contract is that party of the first part "shall convey said main line road, sold hereby to the party of the second part, by proper

instrument or instruments warranting the title, etc.” In the additional contract purchasing two miles, it is stated that the parties did on May 8, 1909, enter into a contract “whereby the party of the first part sold to the party of the second part its main line road.” These contracts conclusively show that the logging road was sold by the Finkbine Company and purchased by Capt. Jones. All that the Finkbine Company reserved was the right to use the road for transportation of its logs and lumber until the said company had completed its cut of timber, and the right to connect its spur lines of logging road and switch tracks. The contract provides for a method of prorating the maintenance cost or upkeep. The original contract contemplated the use of the road by Capt. Jones as a common carrier and spoke of this day and provided certain contingencies, as, for instance, “after the party of the second part begins the use thereof for the operation of trains, said deferred installments of the consideration shall annually and until paid bear such proportion of four per cent. per annum interest as the tonnage carried by the party of the second part” bears to the aggregate amount of tonnage carried by both parties. The so-called “operating contract” states on its face that the first party “sold to the party of the second part its main line road.”

It is contended for appellant that the three documents or contracts constitute only one contract. It is immaterial whether they all relate largely to the same subject-matter, or what nomenclature shall be applied. It was evidently necessary for the parties to enter into each of said contracts in order that their minds should fully meet, and the contracts, of course, must speak for themselves. Certainly the original contract did not convey the additional two miles of road, and certain it is that the first contract did not fix any time for Capt. Jones either to begin or to continue the operation of the road

as a common carrier. Each of these contracts speak of a sale and designates the main agreement as a purchase and sale. There can be no question then about the essential nature of this contract. To avoid the irresistible legal consequences of any interpretation of the contract as a sale, one of the briefs on behalf of appellant views the contract as an option. From this it is argued that the contract "authorized Jones to withdraw" and at another point in the brief "Jones had a right, as a part of the contract itself, to cease his payments and withdraw." If the option premise is granted, then it would follow that Jones would have the option to accept or reject. The option theory finds no support in the language employed by the parties themselves. It is inconceivable that the parties would enter into such detailed provision for the joint use and upkeep of the road if this were an option. It would be absurd to talk about Capt. Jones operating a railroad which he did not own, and it is inconceivable that he would have entered into a contract to operate for three years a road which he had not elected to buy.

Clause 11, according to the majority decision, gave Capt. Jones the right to rescind, and a reversal of this case, and indeed final disposition of the suit, is based upon this clause. In my judgment, the language of this section of the contract nowhere authorizes Capt. Jones to break his own contract. To permit him to withdraw from the contract under the terms of this section, in my judgment, would permit him to take advantage of his own wrong, and the conclusion reached by the court gives judicial sanction to the breaking of a contract. The language of this clause nowhere says that Capt. Jones as the party of the second part may cease or refuse to make any of the deferred payments. The deferred payments are definitely agreed upon in the contract, and Jones "agrees to pay" them punctually at the time stipulated.

The contract does fix the punishment in case he failed or refused to make any one of the payments promptly upon the day it was due. I do not dissent from the holding stressed in the opinion of the court that time may be made the essence of a contract and performance required strictly and literally upon the day or days agreed upon. If Capt. Jones had defaulted in any one of the payments and after the day appointed had tendered his belated payment, these provisions of clause 11 would, at the option of the vendor, the Finkbine Company, apply. These provisions that default in the payment of any one of the installments on the purchase price would render the contract void mean, and should be interpreted to mean, that the contract would be void at the option of the vendor. This, as I understand, is the unbroken line of authority everywhere. Mr. Black, in his recent work on Rescission and Cancellation, discusses the effect of failure or impossibility of performance, and in paragraph 215, among other things, says:

"Where the contract provides that, in case of default in the payment of any installment, the agreement shall be null and void, and the rights of the purchaser thereunder shall be forfeited, this provision is held to be for the exclusive benefit of the vendor, and he is not bound to terminate the contract on the vendee's default. He has the option to do so, but he may, if he chooses, elect to treat the contract as continuing and insist on the performance according to its terms"—citing authorities in the footnotes.

He also discusses contracts in which time is of the essence, and states that in such cases "the other party, not being himself in default, will thereupon have the right to rescind the contract and treat it as at an end," paragraph 216. And again in paragraph 440:

"A provision in a contract for the sale of land, where the price is to be paid in installments, that

default in the payment of any installment shall cause the contract to become void, or give the vendor the right to terminate it, is for his exclusive benefit and gives him an election either to forfeit the contract or to treat it as continuing in force and insist on its completion. But if he chooses to annul the contract on this ground, the rights of the vendee are at an end. But forfeitures are not at all favored, especially in equity, and a provision of this kind in a land contract will be construed strictly."

And again:

"One who has a right to rescind a contract to which he is a party generally has a choice or option as to whether or not he will exercise that right, and his election cannot be controlled by the other party." Paragraph 441.

And in 29 Amer. & Eng. Encl. of Law (2d Ed.), p. 1070, is the following:

"It is not unusual to stipulate in contracts that they shall be 'void' under certain circumstances, and in view of the inaccurate use of the word 'void' heretofore referred to, it generally becomes necessary to ascertain the precise sense in which the word is used. The general rule is that, where such stipulations are inserted for the sole benefit of one of the parties, the word 'void' is to be construed as though the contract read 'voidable.' Thus, provisions in leases, that if the tenant shall not with due promptness perform his covenants to build, repair, insure, pay rent, and the like, the lease shall be 'void,' or 'utterly null and void, to all intents and purposes,' etc., are held to mean voidable at the instance of the lessor."

This is the text law on the subject. Let us review some of the decisions. Our own court answered the question as early as 1844. In the case of *Beaty v. Harkey*, 2 Smedes & M. 563, is the following:

“The single question is: Did the vendee agree to purchase, and the vendor agree to sell? Is it a contract binding on both parties? It surely could not be pretended that the vendee could not have coerced a specific performance, on payment of the purchase money; and, if that be true, then the vendor is entitled to his remedy at law; for all such contracts must have mutuality. The agreement is, in substance, that if the vendee should fail to pay the purchase money, then the contract of sale should be void. A stipulation in a contract, that in case the vendor cannot convey, or if the purchaser shall fail to pay on the appointed day, then the contract shall be void, does not enable either party to vacate the agreement, by failing to perform his part of it. Sugden on Vendors, 44. In such cases, the purchaser may avoid the contract, if the seller do not make a title, and the seller may avoid it, if the purchaser do not pay the money; but the purchaser cannot say, ‘I will not pay,’ and thereby avoid the contract. The default of one party confers on the other the right to rescind. Sugden on Vendors, 261.”

In line with this holding is the decision in the case of *Holloway v. Moore*, 4 Smedes & M. 594. Equity does not favor a forfeiture and the statement of our court in the Holloway-Moore Case that, “If he [the vendee] fail to pay at the time stipulated, the vendors had a right to consider the contract at an end,” was explained by our court in the case of *Walton et al. v. Wilson*, 30 Miss., 576, in which our court directed attention to the fact that under some circumstances even the vendor would not be permitted to rescind. It should be remembered, in this connection, that the present suit is not a suit to enforce a forfeiture. In the present case the vendor did not elect to rescind, but insisted upon the contract being executed. In such case equity will always lend its aid to enforce a specific performance for the purchase of real estate, in the absence of a showing that the vendor is himself in default or un-

able to tender or convey a good title. This, I understand, is the rule of the English Court of Chancery, the rule handed down to us as a part of our equity jurisprudence. In the case of *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. 629, 52 Am. Rep. 310, the holding of the court is clearly indicated by the headnote as follows:

“Where, in an agreement for the sale of land, the parties stipulate that, ‘in event of the failure to comply with the terms of the agreement, the vendor shall be released from all obligation to convey and the vendee shall forfeit all right thereto, and the agreement shall be void,’ the meaning of such clause is that such agreement is void only at the election of the vendor, who can avoid it or enforce it at his option.”

The opinion discusses some of the older authorities which shed light upon this question. In *Eastman v. Wyatt Lumber Co.*, 102 Miss. 313, 59 So. 93, a provision in a contract of this kind provides:

“All lands, titles to which are not perfected by September 1, 1910, the second party is released from buying.”

Our court held that this provision was intended for the benefit of the vendee and if he insisted upon performance he could waive the condition and insist upon the vendor's performance. The case of *Wills v. Manufacturers' Gas Co.*, 130 Pa. 222, 18 Atl. 721, 5 L. R. A. 603, presented for construction the following clause:

“And it is further understood and agreed that upon the failure of the party of the second part, its successors and assigns, to keep and perform all the covenants herein contained, such failure to perform, or breach of said covenant, shall work an absolute forfeiture of this grant or lease, and the privileges or easements hereby given shall absolutely cease, determine, and become null and void.”

The court in construing this provision says:

"It is very plain that this clause of the contract was inserted in the interest and for the exclusive benefit of the lessor, whose purpose it was to have his lands developed for oil and gas."

And further said:

"It certainly was not in contemplation of the parties that the defendants might set up their own default as a cause for the cancellation.

"If this is so, this contract, drawn with exceptional care for the protection of the lessor, is a mere rope of sand; its obligations could only repeat the word of promise to the ear, to break it to the hope."

In *Stewart v. Griffith*, 217 U. S. 323, 30 Sup. Ct. 528, 54 L. Ed. 785, 19 Ann. Cas. 639, there was a stipulation as follows:

"In case the remainder of the first half of the purchase price be not paid on November 7, 1903, then the said five hundred dollars so paid to the said Griffith is to be forfeited and the contract of sale and conveyance to be null and void, and of no effect in law, otherwise to be and remain in full force."

The court construed this provision by saying:

"The condition plainly is for the benefit of the vendor and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word 'void' means voidable at the vendor's election, and the condition may be insisted upon or waived at his choice."

But stress is laid on the opinion of the court upon what is contended to be unusual language in clause 11, as "without any declaration or forfeiture or act of re-entry and without any other act to be performed by it," the vendor. I do not see how these words materially



add anything to the word "void." If a contract is void, it is difficult for me to imagine how it could be more void. A case almost identical with the contract here under consideration is presented in *Rock Island Lumber Co. v. Fairmount Town Co.*, 51 Kan. 394, 32 Pac. 1100. The clause under construction there was as follows:

"And in case the party of the second part shall fail to make the payments aforesaid punctually, and in accordance with the strict terms of this contract, and at the times specified and limited, and to erect or cause to be erected a building as above described and contracted, and perform and complete all the stipulations and agreements herein contained, literally and strictly, without failure or default, then this contract, as far as it binds the party of the first part, shall be determined, and become utterly null and void, and the party of the second part shall forfeit all payments made by him on this contract, and all rights and interests hereby created in favor of the second party shall entirely cease; and the right of possession and all equitable and legal interests in the premises hereby created, together with all improvements made, shall revert and revest in said party of the first part, without any act [or acts] of re-entry, or other act to be performed by the party of the first part; the party of the second part forfeiting all rights to the above premises, or claims for improvements made, together with all moneys paid."

There was a default in the payment of the last installment and a suit for the specific performance. The defendant demurred to the bill, and in disposing of the demurrer the court said:

"It is next contended that the contract at the time this suit was commenced had 'become utterly null and void,' because the 'Rock Island Lumber and Manufacturing Company' failed to pay its last installment. It is argued that, as the lumber and manufacturing company was in

default, both parties were thereupon released from all the obligations of the contract, and that no action could be maintained on it; therefore, that a suit for specific performance could not be enforced at the instance of the town company. The law is well settled. The stipulations in the contract quoted were inserted for the benefit of the town company, the party of the first part, the seller of the lots described in the contract. The lumber and manufacturing company cannot take advantage of its own neglect in the non-payment of the purchase money. Under the contract the town company had the option to avoid or enforce its terms; therefore, it could, if it so elected, maintain this action to enforce the contract and recover the unpaid balance of the purchase money."

It will be noted that the court in this case said "the law is well settled." It is difficult for me to conclude that law which is well settled in other states has never been heard of or applied in Mississippi. In *Ray v. Gas Co.*, 138 Pa. 576, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922, the court declared the principle well settled, and observed:

"No case has been brought to our notice in which the lessee was allowed to take advantage of his own wrong, or to set up his own default to work a forfeiture of his own contract."

In *Chambers v. Anderson*, 51 Kan. 385, 32 Pac. 1098, the contract was almost identical with the language here employed, reading:

"In case the second party shall fail to make the payments aforesaid, and each of them, punctually, and upon the strict terms and times above limited, and likewise to perform and complete all and each of the . . . stipulations aforesaid, strictly and literally, without any failure or default, then this contract, so far as it may bind the said first party, shall become utterly null and void, and all rights and interests hereby created, or then existing

in favor of or derived from the first party, shall utterly cease and determine, and the rights of possession, and all equitable and legal interest in the premises hereby contracted, shall revert to and revest in the said first party, without any declaration of forfeiture or act of re-entry or any other act of said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or services performed, as absolutely, fully, and perfectly as if this contract had never been made."

The court cited to approve the older case of *Canfield v. Westcott*, 5 Cow. (N. Y.) 270, and there concluded that an agreement of this nature is void only at the election of the vendor. See, also, *Galey v. Kellerman*, 123 Pa. 491, 16 Atl. 474; *Agerter v. Vandergrift*, 138 Pa. 576, 21 Atl. 202; *Phillips v. Vandergrift*, 146 Pa. 357, 23 Atl. 347; *Bohart v. Investment Co.*, 49 Kan. 94, 30 Pac. 180.

But it is insisted that clause 11 provides for liquidated damages in event of the breach of the contract, and that, merely because the parties have in advance agreed upon the amount of damage, appellant has the option to break his contract and pay the sum stipulated. If the amount here agreed upon is to be regarded as a penalty instead of liquidated damages, the rule is unbroken that the presence of this provision for a penalty does not justify the party in refusing to perform. Mr. Pomeroy (paragraph 446) says:

"If the sum stipulated to be paid is really a penalty, the party will not be allowed to pay it and then treat such payment as a sufficient ground for refusing to perform the undertaking."

If, however, the amount agreed upon in this case is liquidated damages instead of a penalty, then under the authority of a few cases equity will not decree a performance.

Perhaps the strongest case in support of appellant's contention on this point is that of *Davis v. Isenstein*, 257

Ill. 260, 100 N. E. 940, 45 L. R. A. (N. S.) 52. It will be noted, however, that in this Davis Case the contract was to exchange lands, and it was agreed that one thousand, five hundred dollars should be deposited by each party in escrow as a guaranty of the faithful compliance with the contract, and it was distinctly agreed that, upon the failure of either party to perform, the stakeholder was to turn over to the party willing to perform the amount of the forfeit. The amount of this forfeit was agreed on as "fixed and liquidated" damages. The particular contract there under review was construed as an optional contract, and either party had the alternative to perform or to forfeit. This is an entirely different case from the one at bar. As before stated, there is not a word in the contract in the present case expressly saying that Capt. Jones has a right to refuse to perform and thereby to forfeit what he had paid. It does visit the consequences of his failure upon him, but this is different from expressly declaring that he shall have the option to perform or to forfeit. The court in that case cited some of the cases relied upon in the majority opinion, notably, from Illinois. In the case of *Kock v. Streuter*, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.) 210, cited, there was a contract for the exchange of certain land, and the agreement was as follows.

"It is further agreed that, if either party hereto fails to keep or perform the covenants hereinabove specified, said party so defaulting shall forfeit to the other the sum of one thousand dollars, the said sum being agreed liquidated damages."

The court in that case cited *Pomeroy and Fry* on Specific Performance and directed attention to the fact that it is only where the contract stipulates for one of two things in the alternative, that is, either the performance of the things agreed to be done, or the forfeit of an agreed amount of money in lieu thereof, that equity will not interfere. The court then proceeds to announce:

"If these principles be applied to the contract in question we see no reason why a court of equity will not specifically enforce it. There is nothing in the terms of the contract which indicates that either party has the option or election to do the things provided for in the contract, or to pay the sum of one thousand dollars [provided for] as liquidated damages. The contract provides that the appellee agrees to sell and convey by warranty deed a farm, and the appellant, in consideration thereof, agrees to convey to appellee by warranty deed three hundred and forty-one and ninety-eight hundredths acres. . . . The provision in regard to the forfeiture of one thousand dollars as agreed liquidated damages was merely a security for the performance of the contract, and that there is nothing in the terms of the contract to justify the conclusion that either party had a right to perform the contract, or, in lieu thereof, to pay the sum of one thousand dollars."

This is exactly the same kind of case as the one before us. As it seems to me, the provision whereby the Finkbine Company was to retain all payments as liquidated damages was intended as a security for the performance of the contract, to make sure that Capt. Jones complied. From the significance attached to the strict lettering of clause 11 by the opinion of the court it would appear that the court is holding that, the stronger the language of the contract, the freer the purchaser to withdraw from it. The strict and binding language employed leads me to a conclusion exactly opposite; that is, that these words are employed to guarantee the faithful compliance by the purchaser. This case of *Kook v. Streuter*, *supra*, is an Illinois case, and goes a long way to discount the holding in the other cases from Illinois cited in the majority opinion. But this is not the only reason why I do not regard the other Illinois cases referred to as authority for a reversal. For instance, the case of *Lyman v. Gedney*, 114 Ill. 388, 29 N. E. 282,

55 Am. Rep. 871, was another case for the exchange of real estate, and even in that case of exchange the supreme court affirmed a decree for specific performance. It would unduly prolong this opinion to criticize each of the decisions of the supreme court of Illinois on this subject. When properly understood and applied to the facts in each case, I seriously doubt whether they are in conflict with the views which I entertain. The true distinction seems to be stated by the supreme court of Illinois in the case of *Barrett v. Geisinger*, 179 Ill., 240, 53 N. E. 576, a case seeking to prevent disposition of certain property under a contract to make a will and to decree specific performance. The language of the court is as follows: "The question always is: What is the contract? Is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act? Or is it that one of two things shall be done at the election of the party who is to perform the contract, namely, the performance of the act, or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the court enforcing performance of the very act, and thus carrying into execution the intention of the parties. If the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election to compel the performance of the other alternative."

In the note to *Davis v. Isenstein*, *supra*, as reported in the L. R. A., is a reference to the case of *Hedrick v. Firke*, 169 Mich. 549, 135 N. W. 319, holding that a stipulation for liquidated damages in a contract for the sale of land will prevent a specific performance "only where it appears from the whole contract to have been the intention of the parties that the right to pay the stipulated sum or perform the contract should be optional." In *Donahoe v. Franks* (D. C.) 199 Fed. 262, it is held that the word "retained" could not be construed as meaning "accepted"

and that the vendor had a right to specific performance for the balance of the purchase price. In that case it was expressly agreed that payments on the purchase price in case of breach of the contract should be forfeited and "retained" as liquidated damages. In *Heckman's Estate*, 236 Pa. 193, 84 Atl. 689, cited in the majority opinion, the suit was by the vendee after he had failed to comply with his contract at the time stipulated. It was held that the language, "in case of forfeit, all rights under this agreement should be at an end," precluded his recovery. That is an entirely different case from the one now before us. It will be observed, I think that the opinion in *Davis v. Isenstein* went further in its holding than any of the cases which it cited and relied upon.

In the case of *Hahn v. Concordia Society*, 42 Md. 460, referred to in the majority opinion, the contract under review was an obligation of actors to perform at a theatrical engagement, and there was an express agreement to pay two hundred dollars forfeit for the violation of the contract. The prayer was for an injunction and the case did not, of course, involve the sale of real estate. In the case of *St. Mary's Church v. Stockton*, 8 N. J. Eq. 520, it was doubtful whether the vendor could convey a good title, and the parties bound themselves one to the other in the sum of five thousand dollars for the performance of the covenants. There was really no decision of the point here under consideration. *Bodine v. Glading*, 21 Pa. 50, 59 Am. Dec. 749, involved the sale of real estate at auction and a written stipulation that:

"The cash is to be paid within fifteen days from the sale or the property may be resold at the risk and expense of the purchaser."

There were certain objections made to the title and, these objections were not cleared and removed for some time. The court declined to decree specific performance on the ground of lack of mutuality.

The operating contract sheds light upon the real intention of the parties. It certainly was never the intention of the parties that Capt. Jones had the option to withdraw in any of these contracts whether they are to be considered as one continuing contract or as separate obligations. The fact that Jones entered into a solemn obligation to operate the road for a period of three years shows that in any event the road was to become his property. There is nothing in this operating contract which expressly declares that payments forfeited by Capt. Jones on the consideration or purchase price of the first contract is to compensate the Finkbine Company for Jones' failure to operate the road. The operating contract does provide that it "shall not alter or affect in any respect any of the provisions of the said contract of May 8, 1909, except as above specifically stated." It left the original contract of purchase in full force and effect and neither added to nor took away the provision for liquidated damages. It was certainly not within the contemplation of the parties nor part of the agreement that clause 11 providing for liquidated damages should compensate for any damages for failure to operate the road as a common carrier. In the first contract there was no express agreement to operate at all, although the contract, of course, contemplated such use to be made of the property. Now, then, could the parties in May, 1909, agree upon liquidated damages for a contract which had not been entered into and which was not entered into until March, 1911? The provision then for liquidated damages has no effect whatever upon the contract of March, 1911, the so-called operating contract, and for the breach of this operating contract the Finkbine Lumber Company, or its assignee, has the undoubted right either to a specific performance or damages in lieu thereof. There is nothing in the language of this operating contract which makes its performance contingent upon whether Jones breaches or executes the original contract of purchase. It expressly provides



that, when the party of the first part vacates the said railroad, then Capt. Jones, as second party, "will within the said six months equip, maintain, and operate the said main line road," etc. This was the express, unqualified, unambiguous agreement. Under the opinion of the court Capt. Jones is now allowed to breach this operating contract simply and solely because he breached the first. This, in effect, makes one breach justify another. I concede that it would be impossible for Capt. Jones to operate for three years a railroad which he does not own, but this, in my judgment, goes far to show the propriety of the decree rendered by the learned chancery court decreeing specific performance of the contract of purchase. The court not only reverses the decree, but enters judgment here for the appellant. Certainly the complainant had either the right to a specific performance of the operating contract or to a recovery of damages for the breach thereof in lieu of specific performance. The mere retention by the Finkbine Company of the payments made on the purchase price as liquidated damages for the failure of Capt. Jones to finish paying for the property would not and could not compensate for the failure to operate the road for three years. My attention has not been directed to any case where the court failed to decree specific performance for the sale of real estate, even though there is a provision for liquidated damages. There are some cases cited where the contract was for an exchange of lands and the forfeit or liquidated damages stipulated for was an agreed sum of money put up in advance or agreed to be paid in advance separate from the consideration.

I confess I do not fully comprehend the attitude of the court in first holding that clause 11 authorizes Capt. Jones to withdraw from all three contracts, and therefore entitling him to a decree here in his favor, and then proceeding to hold that a specific performance of a contract

for the operation of a railroad cannot be had in Mississippi. I see no necessity also in the court, under its main view of the case, holding that the Mississippi Farms Company, not being a party to the contract, cannot recover anything in the way of damages. If clause 11 justifies Capt. Jones in withdrawing altogether, then the demurrer to the original bill should have been sustained and the cause dismissed. This would put an end to the case, and the court falls into an inconsistent position in discussing or deciding any other question in the case. For this reason I deem it unnecessary for me to discuss the legal rights of the Farms Company for any expenditures upon its own account or damages suffered by it other than as assignee. I have some views on the measure of damages in this case; but, since the case turns upon the one and only point of Jones' right to withdraw and forfeit his payments, it will avail nothing for me to discuss moot questions. The case is not to be remanded, and the question of the measure of damages presents an immaterial inquiry.

I am convinced that Capt. Jones beyond doubt bought a railroad, and, even though it would be the proverbial "white elephant" on his hands, he should be required to pay for it. To hold otherwise would be to allow him to take advantage of his own default, and, in the language of one of the cases above quoted from:

"This contract, drawn with exceptional care, . . . is a mere rope of sand; its obligations could only repeat the word of promise to the ear, to break it to the hope."

---

LEE ET AL v. BLEWETT, ET AL.

[77 South. 147, Division A.]

**WILLS. Marriage. Revocation.**

The reason upon which the rule of the common law that a will made by a *feme sole* was revoked by her subsequent marriage

---

Opinion of the court.

[116 Miss.]

was based, was that marriage destroyed the ambulatory nature of the will and left it no longer subject to the wife's control, but since our statutes removing the disabilities of coverture, beginning with chapter 496, page 725, Laws 1866-67, having conferred full testamentary capacity upon married women, the reason of the rule has ceased, and consequently so has the rule itself.

APPEAL from the chancery court of Londes county.  
HON. ALBERT Y. WOODWARD, Chancellor.

Suit by Means Blewett and others against Blewett Lee and others. From a decree for complainants, defendants appeal.

The facts are fully stated in the opinion of the court.

*Sturdivant, Owen & Garnett* and *R. V. Fletcher*,  
for appellant.

*Granade & Granade*, for appellees.

SMITH, C. J., delivered the opinion of the court.

In October, 1869, Mary B. Wooldridge made the will here in question. In 1875 she married Abram Nave, from whom she was divorced in 1883, and in 1889 she married R. L. Portwood, whom she survived. She died in May, 1915, without issue. The will made by her in 1869 was, after her death, probated in common form before the clerk of the court below in vacation. Afterwards appellees, who are heirs at law of the testatrix, exhibited their bill against appellants, who are beneficiaries under the will, setting forth the foregoing facts, and alleging that the will had been revoked by the marriages of the testatrix entered into by her subsequent to the execution thereof, and praying that the act of the clerk in admitting it to probate be set aside and held for naught. A demurrer to the bill was interposed by appellants, and overruled by the court,

whereupon they filed an answer; but, no issue of facts being raised thereby, the cause was set down on bill and answer, and resulted in a decree in accordance with the prayer of the bill.

The sole question presented to us is: Was the will revoked by the subsequent marriages of the testatrix? The reason upon which the rule of the common law that a will made by a *feme sole* is revoked by her subsequent marriage is based is that marriage destroys the ambulatory nature of the will and leaves it no longer subject to the wife's control. *Garrett v. Dabney*, 27 Miss. 335. But since our statutes removing the disabilities of coverture, beginning with chapter 496, p. 725, Laws of 1866-67, enacted prior to the execution of the will here in question, have conferred full testamentary capacity upon married women, the reason for the rule has ceased, and consequently so has the rule itself. "*Cessante ratione legis, cessat ipsa lex.*" 40 Cyc. 1203; 30 Amer. & Eng. Enc. (2d Ed.) 648. From which it follows that Mrs. Portwood's will was not revoked by the marriages entered into by her subsequent to its execution..

*Reversed, and bill dismissed.*

---

HEBRON BANK v. GAMBRELL.

[77 South. 148, Division A.]

1. USURY. *Actions. Evidence. Accounting.*

Where in a suit by a customer of a bank for an accounting he filed slips showing that the bank had charged him one hundred and seventeen dollars and forty-seven cents usurious interest on invoices and overdraft accounts and testified generally that he had examined the books of the bank, and it was his best judgment that the overcharge or the usurious interest charged on

both these accounts amounted to two hundred and forty dollars and thirty-two cents, such evidence did not justify a decree in his favor for both the one hundred and seventeen dollars and forty-seven cents and the two hundred and forty dollars and thirty-two cents as the first item was included in the second and besides the testimony as to the two hundred and forty dollars and thirty-two cents is very indefinite and should have been more certain and specific.

2. **BANKS AND BANKING. Evidence. Actions against banks. Opinion.**

Where the bank with which a partnership engaged in the sawmill business did their banking business credited the partnership with only eighty per cent. of the amounts of sale of lumber, retaining twenty per cent. of the price until the purchaser had finally settled for the lumber, and one of the partners brought suit for an accounting, his testimony that he had looked at the books of the bank and tried to ascertain as best he could what amount if any was due the partnership on the twenty per cent. retained and that according to his best judgment, he thought it was about six hundred dollars, such evidence was his opinion rather than a statement of fact, and was too vague and indefinite to support a decree in his favor, especially where officers of the bank testified and explained according to the books that the partnership had been credited fully with the amount retained.

3. **USURY. Recovery of usurious interest. Ignorance or mistake.**

Where a bank is sued for usurious interest charged by it, the fact that the officials of the bank were ignorant of the law or temporarily overlooked it, is no defense.

4. **USURY. Recovery of usurious interest. Rights of assignee.**

Where usurious interest was paid to a bank by a partnership, it was recoverable by one of the partners to whom the partnership account with the bank, together with all charges of every character, except items specifically excluded, were transferred and assigned on a settlement and dissolution of the partnership, since in such case he stood in the place of the partnership.

5. **SET-OFF AND COUNTERCLAIM. Equitable set-off. Accounting.**

In a suit for an accounting, where the bill asked the chancery court to take jurisdiction of all equities and matters of accounting between the parties, and the chancellor found that the amount due defendant on a note, secured by a trust deed on oxen, for which defendant had instituted a suit in replevin, was a specific amount, he should have allowed any amount due plaintiff to

116 Miss.]

Opinion of the court.

be set-off against the amount due the defendant, so that either party could then plead in the circuit court where the replevin suit was pending, the decree of the chancery court relating to the matter.

APPEAL from the chancery court of Smith county.

HON. G. C. TANN, Chancellor.

Suit by J. D. Gambrell against the Hebron Bank and another. From a decree for plaintiff, the defendant named appeals.

The facts are fully stated in the opinion of the court.

*Hilton & Hilton*, for appellant.

*T. J. Willis*, for appellee.

SYKE, J., delivered the opinion of the court.

The appellee, J. D. Gambrell, filed a bill in the chancery court of Smith county against J. W. Meadows and the Hebron Bank for an accounting. The bill alleged that Meadows and Gambrell had been engaged in the sawmill business as partners, and that they did their banking business with the appellant bank. It was also alleged in the bill that the bank and the defendant Meadows conspired to defraud the complainant out of certain moneys; further, that the bank had charged individual checks of Meadows to the partnership account and made other erroneous charges on the partnership and individual account of complainant Gambrell. It was alleged that the bank had charged the appellee individually and the partnership on notes, invoices, and overdraft accounts ten per cent. usurious interest. It was also alleged that the bank had failed to credit the partnership account with about six hundred dollars, being twenty per cent. of the proceeds of sales of certain cars of lumber, and that the account was entitled

to this credit. The answer denied all of the material allegations of the bill relating to the erroneous charges, mistakes, and usurious interest, and denied fraud and collusion. A great deal of testimony was introduced by both parties. The chancellor found that defendants were not guilty of any fraud. He also found a great number of items in controversy in favor of the defendant bank. There is no cross-appeal by Gambrell. Certain items were found by the chancellor in favor of the complainant, Gambrell, against the bank, from which this appeal is prosecuted. We shall notice briefly these items.

The chancellor found that Gambrell was entitled to recover of the bank as usurious interest charged him by the bank two hundred and forty dollars and thirty-two cents on the invoice account and one hundred and seventeen dollars and forty-seven cents on the overdraft account, both partnership accounts. We have carefully searched the record for testimony sustaining this finding of fact. The appellee, Gambrell, as an exhibit to his testimony, filed certain slips showing that the bank had charged him one hundred and seventeen dollars and forty-seven cents interest on invoice and overdraft accounts. He then stated generally that he had examined the books of the bank, and it was his best judgment that the overcharge or the usurious interest charged on both these accounts amounted to two hundred and forty dollars and thirty-two cents. In other words, the appellee, Gambrell, stated in an indefinite way that he thought the usurious interest charges on both invoice and overdraft accounts amounted to two hundred and forty dollars and thirty-two cents. The chancellor, however, rendered a decree in his favor for the two hundred and forty dollars and thirty-two cents and the one hundred and seventeen dollars and forty-seven cents. The item of one hundred and seventeen dollars and forty-seven cents interest on

overdraft account is supported by the slips made exhibits to this testimony. There is no testimony, however, other than the indefinite statement of the appellee, Gambrell, relating to the two hundred and forty dollars and thirty-two cent item, and this, according to his statement, covers both overdraft and invoice account. Since the overdraft account was covered by the two hundred and forty dollars and thirty-two cent charge, then it was error in the chancellor to again allow this item as a separate credit since it was included in the two hundred and forty dollars and thirty-two cent item. The testimony as to the two hundred and forty dollars and thirty-two cent item is very indefinite, and should be more certain and specific upon the second trial of the case.

There is also a finding in favor of the appellee of three hundred dollars as one-half of a twenty per cent. deposit retained by the bank from proceeds of sales of cars of lumber of the partnership. The chancellor found that the bank had not given the partnership credit for six hundred dollars due it as a balance of twenty per cent. retained by the bank until a full settlement had been had with the purchasers of this lumber. It seems to have been the custom, when the partnership shipped lumber, for the bank to at once credit their account with eighty per cent. and retain twenty per cent. of the price until the purchasers had finally settled for the lumber. When the lumber was finally paid for, then the twenty per cent. would be credited to the partnership account. The testimony upon which the chancellor found that the partnership was due this six hundred dollars was that of the appellee, Gambrell. He stated that he had looked at the books of the bank and tried to ascertain as best he could what amount, if any, was due them on the twenty per cent. retained by the bank, and that according to his best judgment, he thought it was about six hundred dollars, but that the



books of the bank would show; that he had not gotten any credit for this twenty per cent. The cashier and assistant cashier of the bank testified and explained according to the books where the partnership had been credited fully with the twenty per cent. retained as above set forth. On the vague and indefinite statement of the appellee, Gambrell, we think the chancellor erred in finding that the partnership was entitled to a balance of six hundred dollars and allowing Gambrell a credit for three hundred dollars. We do not think the above testimony of Gambrell can be considered as a statement of fact, but rather as his opinion. Especially is this true when that testimony is contradicted by the officers of the bank who explained fully how the partnership was given credit for this amount. Before the appellee can recover this three hundred dollars he must shown by testimony that the partnership has not been given this credit, and this cannot be done by a mere statement of his opinion. The partnership accounts and the books of the bank should show conclusively the real truth of this matter.

There are other items of usurious interest charged the partnership by the bank which are found in favor of the appellee. It is contended by the appellant that these were not usurious charges, because the cashier of the bank testified that they merely overlooked the law making it usurious interest to charge ten per cent. The testimony shows that ten per cent. interest was charged the partnership. The ignorance of the law of the bank officials or their temporarily overlooking the law is no excuse for this charge. It is clearly usurious interest, and the appellee is entitled to recover it back. It is further claimed by the appellant that the appellee should not be allowed to recover the entire interest charged to the partnership account. The testimony, however, shows that in the settlement and dissolution of the partnership of Meadows and Gambrell the part-

nership account of the bank, together with all charges of every character, except the twenty per cent. items above mentioned, were transferred and assigned by Meadows to Gambrell. So, for the purposes of these interest charges on notes, invoices, and overdraft accounts, Gambrell stands in the place of the partnership, and can recover these usurious charges.

Before the filing of this bill in the chancery court the appellant bank, which held a deed of trust on certain yoke of oxen, claimed to be the property of Gambrell, through its trustee, had instituted a replevin suit in the circuit court to recover possession of them. The amount due under the note and deed of trust is about seven hundred and seventy-five dollars. The bill of the appellee asked the chancery court to take jurisdiction of all equities and matters of accounting between the parties to the suit. The chancellor found that the amount due the bank by appellee under this note secured by the deed of trust was seven hundred and seventy-five dollars and interest, but he failed to allow the appellant to set off this amount due him against the seven hundred and seventy-eight dollars the chancellor found appellant was due appellee. We think the court should have allowed any amount due appellant as an offset against any amount due appellee. Either party could then plead in the circuit court, where the replevin suit was pending the decree of the chancery court relating to this matter.

The decree of the lower court will be affirmed in all of its findings except those above specifically enumerated and discussed. As to them, namely, the item two hundred and forty dollars and thirty-two cents, interest on invoice account of Meadows and Gambrell, the item one hundred and seventeen dollars and forty-seven cents interest on overdraft account of Meadows and Gambrell, the three hundred dollar item, being one-half of twenty per cent. alleged to have been retained by

the bank, and the failure of the court to allow a set-off of the amount due on the note secured by the deed of trust for which the replevin suit was pending in the circuit court, the cause is reversed, and remanded for a new trial.

*Reversed and remanded.*

---

MILLER v. FISHER.

[77 South. 151, Division A.]

1. CONTRACT. *Agreement. Implied agreements. Repairs.*

Before the owner of personal property can be held liable in debt for repairs done upon it, there must be some contract existing between the owner and the person making the repairs which contract may arise by agreement either express or implied, or by some act or agency of the parties creating an obligation between the parties concerning the matter involved.

2. SAME.

Where the owner of a motorboat, having allowed a third person to take possession of the boat and use it, the third person who was to keep the boat in repair, contracted in his own behalf with plaintiff for making repairs on the boat and the third person made part payment on the repairs and the owner who agreed to advance a sum of money for his benefit, sent plaintiff a check for a further amount. In such case, notwithstanding plaintiff's understanding that the boat was liable for the repairs, he could not, the owner having in no way contracted for the repairs, or agreed to become liable therefor, hold the owner for such repairs.

APPEAL from the circuit court of Jackson county.

HON. J. H. NEVILLE, Judge.

Suit by Chas A. Fisher against T. J. Miller. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Wm. D. Bullard, for appellant.

In view of the testimony there can be no question of agency in this case, unless it can be shown that appellant made herself liable by some subsequent act, or in some way became responsible to appellee after the repairs were completed. There is nothing in the entire record to suggest agency or any manner of liability on the part of appellant, unless it is claimed that the letter dated Sept. 7, 1915, from Miller to Fisher and the check for one hundred and twenty-five dollars inclosed therewith operated in some way to make appellant liable for the alleged balance due from Dan Sherman to appellee. On page 5 of the record is a copy of this letter, as follows:

"Enclosed please find check for one hundred and twenty-five dollars for payment of work done on engine, hoping that same will reach you promptly, I beg to remain, Yours truly, T. K. Miller."

This check was not sent as a part payment of a debt that Miller owed or had assumed, it was sent at Dan Sherman's request and was the remainder of the one hundred and fifty dollars which appellant agreed to advance Sherman for the repairs on the boat.

The court erred in refusing defendant's request for a peremptory instruction to find for defendant. The court also erred in inserting in the third line of defendant's second instruction after the word, "defendant," the words, "or an agent of defendant."

The fourth instruction given plaintiff is erroneous in that it submits to the jury the question of Sherman's agency when there was no evidence to warrant such an assumption of agency.

The fifth instruction given plaintiff is clearly erroneous. Not only is it wrong as matter of law but the language is misleading, to wit: "And the defendant, T. J. Miller, after the work was completed did pay the sum of one hundred and twenty-five dollars direct to Chas. A. Fisher, then and thereby the defendant ratified the acts of Mr. Sherman in making said agreement with plaintiff

thereby becoming liable for the full amount of the debt."

"And the language is not cured by the closing sentence of the instruction. The case of *Meyer, Weis & Co. v. Geo. C. Baldwin*, 52 Miss. 263, is applicable here; also the authorities cited in brief of learned counsel for plaintiff in error. Under the facts in this case even if Miller had made the one hundred and twenty-five dollars payment voluntarily and not at Sherman's request, he would not have been liable for any remainder due Fisher because he was under no obligation to pay any part of the debt. *Brown v. Rouse*, 104 Cal. 672, 38 Pac. 507. Sherman was not acting for Miller and therefore the one hundred and twenty-five dollar payment could not operate as a ratification. 31 Cyc, page 1251, paragraph C and citations thereunder.

The sixth, instruction is also erroneuos, because it leaves out the question of whether Miller, even if he made the payment "of his own account direct to the plaintiff," thereby intended to ratify Sherman's contract and himself become liable therefor. The intent to ratify must either be express or implied, and Miller's letter showed that he intended the one hundred and twenty-five dollars to pay in full Sherman's debt. 31 Cyc., p., 1260, par. H.

It is difficult to cite authorities under the facts in this case, and it is remarkable that the learned court below should have gone off on the theory that the question of agency, or the ratification of the unauthorized acts of a third person could be involved in it.

*Denny & Heidelberg*, for appellee.

As to the question of agency upon which counsel for appellant seem to build his hope for a reversal of this case it seems to us that there can be nothing but an affirmation of this case upon the record as stated above. Miller has a boat; he turns it over to Sherman to use; Sherman after using it for some time and ascertaining

that it needs repairs goes to the appellee and enters into a contract with him for repairing the boat; there is disagreement between them as to the terms of this contract as to the amount of the price to be paid for said repairs, but we would call the court's attention to the fact that there is no disagreement, between them as to the terms and condition of any contract until it gets above the sum of one hundred and fifty dollars but we would call Counsel for appellant's attention to the fact that he has misunderstood the facts in this case if he thinks that *Myer v. Baldwin*, 52 Miss. 263, is an authority in this case. Why was appellant, in the letter that he wrote appellee when he sends him a check for one hundred and twenty-five dollars, saying that he hoped this check would reach appellee promptly, and that it was for "work done on engine," if to this it be added that on page 12 of the record near the center, appellee states that he did not extend any credit to Dan Sherman, and that Dan Sherman told him that it was not his boat but appellant's. Sherman asked for a ten days' trial of the boat after the work was completed; instead of this it was twenty days or more and then the check came in from appellant. The appellee had, he states, refused to do the work for Sherman and knowing that ordering work done upon same, he was, it seems acting as an agent of appellant, and upon that idea appellee did the work. He says on page 15: "He told me it was Mr. Miller's boat and I relied upon the fact that the boat was good for it. I had made investigation that Dan Sherman's credit would not be good for it and I could not extend that much credit to him and I accepted the work and did the work on the strength of the fact that I knew the boat belonged to Mr. Miller, a responsible man and was under the impression that the work done on the boat and the repair done on it would be a lien on the boat, and that was the reason I went ahead with it."

Now under this state of facts, does or would Miller have to know about this contract before he would be bound by the same? Sherman was his agent certainly to the extent that he let him have the boat, and use it and when it came to repairs Fisher was unwilling to repair the boat on Sherman's credit. Sherman said it was Miller's boat and came to appellee to repair same. If this is not agency what can be?

Appellant in sending the check for one hundred and twenty-five dollars to appellee did not state that he was sending the check for Sherman; he did not mention Sherman at all, but sent the check "for payment for work done on engine; not for work done for Sherman, not for work done for Sherman on his (appellant's) boat, or engine, but work done on engine."

The case of *Baker v. Byrne*, 2 Smeed & Marshall, page 193, says: "A subsequent recognition of an act done by an agent or by one who assumes to act as such, is usually binding on the principal, if made with a full knowledge of the act done, as a previous authority." Now the act speaks for itself in this case. Further the case says that, "Whether the principal possessed such knowledge, or not, must be determined by the jury and they may properly draw their conclusion from his act and declaration subsequent to the performance of the act."

As stated by counsel for appellant it is difficult to cite authorities under the facts in this case. But we submit that the judgment below should be sustained and we further submit that the trial in the lower court was in every respect a correct pronouncement of the law in so far as the law announced by the instructions was concerned and that the case having been submitted to the jury under the proper instructions and the jury having said whom they believe in the testimony, there should be no reversal of the case upon any consideration.

HOLDEN J., delivered the opinion of the court.

The appellee, Chas. A. Fisher, sued appellant, T. J. Miller, and obtained judgment for the sum of seventy-nine dollars alleged to be due for services performed by Fisher in repairing a motor boat belonging to Miller. Appellant Miller denied liability on the ground that he made no contract for the repairs, and that at the time the contract was made and the work done the boat was in the possession of a third party, Dan Sherman, who was using the boat for his individual benefit, having full use and control of it, and was to keep it in repair at his own expense; and that the contract for repairs made by Sherman with appellee, Fisher, was not authorized nor ratified by appellant, but that Sherman made the contract in his own behalf and expressly obligated himself to pay for the repairs. The contention of appellee, Fisher, appears to be that when the contract for repairs was made Dan Sherman was acting as agent of appellant, or that appellant became liable for the debt by ratification.

It appears from the testimony in this case that the appellee, Fisher, who was plaintiff in the lower court, had no contract, either express or implied, with appellant Miller for the repair of the boat. Appellee, Fisher, testified that Sherman contracted with him to repair the boat, and that Sherman was to pay for it, but that he did not look to Sherman for payment as he was under the impression that the boat or its owner would be liable for the debt due for the repairs. He does not claim that Sherman represented to him that he was acting as agent for appellant, Miller, owner of the boat, in having the repair work done. On the other hand, Sherman testified that he (Sherman) made the contract for repairs on his own account and that he was liable to appellee Fisher for the amount contracted for the repair work. It seems that the appellee, Fisher, was laboring under an erroneous impression as to the law, in that, as he testified:



“He (Sherman) told me it was Mr. Miller’s boat, and I relied on the fact that the boat was good for it; and that was the reason I went ahead with it.”

Evidently Mr. Fisher thought that he could hold the boat or the owner of it for the amount due for the repairs without first having some sort of contract or agreement with the owner or his agent, either express or implied, which he did not have in this case according to the undisputed testimony in the record. This was a simple suit for a debt, and was not an action to enforce a mechanic’s lien against the boat under the statute. Sherman testified that he was operating the boat for himself and that he was not acting as agent or employee of Miller, and that he did not represent to Fisher that he was in any way an agent of Miller, but notified Fisher at the beginning that he was contracting for himself, and he would pay for the repairs to be made on the boat. And upon this contract between appellee Fisher and Sherman, Fisher proceeded to make the repairs. This testimony of Sherman’s is undisputed.

It further appears from the testimony in the record that, after the repairs were made upon the boat and it was tried out and accepted by Sherman, the appellant, Miller, mailed to appellee, Fisher, a check for one hundred and twenty-five dollars, and said in the letter:

“Inclosed please find check for one hundred and twenty-five dollars for payment for work done on engine. Hoping that same will reach you promptly, I beg to remain,

“Yours truly,

T. J. MILLER.”

It is shown without contradiction that this check was sent at the request of Dan Sherman and was an amount advanced by Miller to Sherman by agreement to pay for the repairs on the boat. Dan Sherman had already paid twenty-five dollars to appellee, Fisher, as part payment on the work shortly after the contract was made between Sherman and Fisher. Sherman also claims that Fisher

is due nothing now, as the one hundred and fifty dollars paid is all that was due under the contract. But this is not material to the case before us now.

From the undisputed testimony in this record it seems clear to us that the appellee, Fisher, has no cause of action against the appellant, Miller. Miller did not enter into any express contract or agreement with Fisher to repair the boat, nor did he impliedly agree to pay for such repairs. There is no testimony whatever in the record showing that Sherman was acting as the agent of Miller in having the repairs done; but, on the contrary, it appears conclusively that Sherman was not acting as the agent of Miller, and he so informed appellee, Fisher, at the time the contract was entered into between them. Sherman himself had paid twenty-five dollars to Fisher on the contract and had obligated himself to pay the balance when the work was finished. The fact that appellant Miller paid to appellee, Fisher, one hundred and twenty-five dollars for work done on the boat can in no sense be construed as a ratification, or an assumption or implied agreement to pay the balance claimed in this suit. It is undisputed that this one hundred and twenty-five dollar payment made by Miller was an advancement in behalf of Sherman, and was paid by Miller at the instance and request of Sherman. In view of these undisputed facts in the record, we are bound to hold that there is no liability on the part of appellant, Miller, for the balance due for repairs on the boat. Before the owner of personal property can be held liable in debt for repairs done upon it, there must be some contract existing between the owner and the person making the repairs, which contract, of course, may arise by agreement either express or implied, or by some act or agency of the parties creating an obligation between the parties concerning the matter involved; but no contract appears to have been made in this case. The judgment of the lower court is reversed, and judgment entered here for appellant.

*Reversed and judgment here.*

## UNITED STATES FIDELITY &amp; GUARANTY Co. v. YAZOO CITY.

[77 South. 152, Division A.]

MUNICIPAL CORPORATIONS. *City clerk. Liability on official bond.*

Where a city ordinance required all moneys collected by the superintendent of a municipal street car line to be paid into the city depository, but in violation thereof the superintendent paid such collections to the city clerk who was only authorized to collect moneys due for city privilege tax licenses. In such case the city clerk did not receive such moneys by virtue of his office or under color of his office, and the surety on his official bond was not liable for his defalcation, since he had no apparent authority to receive the money and before an act can be said to be done under color of office there must be an appearance of right under the law to do the act.

APPEAL from the chancery court of Yazoo county.

HON. O. B. TAYLOR, Chancellor.

Suit by Yazoo City against the United States Fidelity & Guaranty Company. From a decree for the city, the defendant appeals.

The facts are fully stated in the opinion of the court.

*Barbour & Henry*, for appellant.

It is settled law, in regard to which the authorities all agree, that a surety is entitled to stand upon the strict terms of his contract; to the extent, in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. The obligation is not to be extended by implication beyond the terms of the contract, which contract is said to be *strictissimi juris*. *Lipscomb v. Postell*, 38 Miss. 476; *Greer v. Bush*, 57 Miss. 575; *Hall v. Lafayette*, 69 Miss. 529; *Lafayette v. Hall*, 68 Miss. 719; *Denico v. State*, 60 Miss. 949; *Robinson v. State*, 47 Miss. 423; *State v. Felton*, 59 Miss. 402.

With the proposition settled, and, in fact, conceded by opposing counsel, that the defendant surety company's liability is not to be extended by implication beyond the terms of the contract, which contract is *strictissimi juris*, we hardly see how it can be seriously controverted that reversal in this case must follow. McCormick, the city clerk, could only receive the money in his official capacity as clerk, as alleged in the bill, if the law imposed that duty upon him. If he received it in any other way there is no liability upon the surety. It makes no difference, that the city officials, by neglect or oversight or concurrence, permitted, knowingly, McCormick to handle the street car funds. This course of dealing could not change the law of the city, which alone fixed McCormick's official duties as clerk, and which alone is evidenced by the ordinances of the city, solemnly enacted by the city council. See *People v. Pennock*, 60 N. Y. App. 421, hereinafter argued at length.

With the fact clearly established by the ordinances offered by the defendant that the duty to handle the fund in question was expressly fixed by law upon Rivers, and there being no law requiring McCormick, or even authorizing McCormick, as city clerk, to handle this fund, we call the court's attention to certain conclusions of the controversy raised in this case.

The case of *Orton v. City of Lincoln*, 41 N. E. 159, decided by the supreme court of Illinois, is directly in point, and conclusive here. In that case, the city clerk gave bond for the faithful discharge of the duties of his office, etc. Under the ordinance, the clerk was required to collect certain license fees, not including money from dramshop licenses. By an ordinance, dramshops were required to pay a license, and they were to be paid into the city treasury. The city clerk, one Starkey, collected the dramshop fees, and defaulted. There was judgment against his official bondsmen for the shortage. The court held that the ordinance did not authorize the clerk to

collect the dramshop fees, and reversed the lower court, holding there was no liability. The court said:

• “A surety is only to be held by the precise terms of his undertaking. His liability is *strictissimi juris* and cannot be extended by construction. . . . When they understood that the principal should account and pay over all money that came to his hands by virtue of his office, the intendmant was that such money as should be received by the clerk in pursuance of law, and under the ordinances of the city, in his official capacity by virtue of his office, was referred to, and not such money as he might elect to accept without right, and of which some other official was the legal recipient. Appellants were not sureties for moneys which, by virtue of the ordinances of the city, should have been paid the city treasurer. The mere officiousness of the clerk in the assumption of duties, or the negligence of other officers in the discharge of their duties, cannot extend the sureties' liability beyond the terms of their undertaking.”

We also call the court's attention to the cases of *Van Valkenburg v. Patterson*, 47 N. J. L. 146; *People v. Pennock*, 60 N. Y. Appeals 421; *San Luis Obispo County v. Farnum*, 41 Cal. 445; *Wilson v. State (Kansas)* 72 Pac. 517; “*Brandt on Suretyship & Guaranty*, Par. 451; *Cressey v. Gierman et al*, 7 Minn. 398; *McKee v. Griffin*, 66 Ala. 211; *San Joes v. Welch*, 65 Cal. 358; *People v. Cobb (Cal.)*, 51 Pac. 325; *Nolley et al v. Calloway County Court*, 11 Mo. 447; *People v. Pennock*, 60 N. Y. 421; *Saltenberry v. Loucks*, 8 La. Ann. 95.

A careful consideration of the principles declared by the decisions of our own court is equally conclusive here. Beginning as early as Walker's Report, page 260, this court has announced the principle in conformity with the principles set out in the cases reviewed above. *Matthews v. Montgomery*, 25 Miss. 150; *Furlong v. State*, 58 Miss. 717; *Brown v. Phillips*, 6 Smedes & Mar-

shall, 51; *Brown v. Mosley*, 11 Smedes & Marshall, 354; *Brooks Oil Company v. Weatherford*, 91 Miss. 501.

Attention is called to the text in Vol. 4 of the American & English Encyclopedia of Law, page 681. This text is an accurate and condensed statement of the substance of the repeated holdings of this court, and of the courts of various states. 25 A. & M. Encyclopedia of Law, 728. The foregoing text emphasizes the argument that the case of *Brooks Oil Company v. Weatherford*, 91 Miss. 501, *supra*, is strongly persuasive here.

We therefore respectfully submit that, in this case, as it appears without controversy that there was no authority in law for the street car superintendant, Rivers, to pay this money to the city clerk, and as it affirmatively appears without controversy, that the law imposed the duty upon Rivers to collect the money and pay it direct into the city treasury, a reversal must necessarily follow.

*Holmes & Holmes*, for appellee.

Counsel for appellant are mistaken in the assertion that it is conceded by us that the appellee's liability under its contract is to be strictly construed, and that its contract is *strictissimi juris*. On the contrary, we respectively submit that the surety company's contract under the law, as now well settled, is to be construed most favorably to the party indemnified. The overwhelming weight of authority now supports the proposition that the rule of *strictissimi juris*, which was in force when private persons, without fee or premium, executed bonds, is not applicable to the contracts of surety companies who become sureties for profit, and it is well settled by the weight of authority that the contracts of surety companies are now to be construed by the courts like other insurance contracts, that is most strongly in favor of the party sought to be indemnified. It is said on page 47 of Vol. 14, R. C. L.,

as follows: "As to the construction to be given to the provisions of an indemnity or fidelity bond given by a surety company, which differs materially from the old bond of indemnity it is well settled that where the contract has been drawn by the surety and its provisions are susceptible of more than one construction, all of which are consistent with the objects for which the contract was executed, that construction must be adopted which favors the party indemnified."

It is also said in the note on page 513, of Volume 33, L. R. A. (N. S.) as follows: "The overwhelming weight of authority supports the proposition that the rule of *strictissimi juris* by which the rights of uncompensated sureties are determined, is not applicable to the contract of profit; that their business is essentially that of insurance; and that therefore their rights and liabilities under their contracts will be governed by the laws of insurance."

We beg most respectfully to direct the court's attention to the theory that McCormick received the money *colore officii*, and that his surety is therefore liable for the misappropriation. There is practically no conflict in the authorities, and little or no doubt, that a surety on an official bond is liable for the acts of the principal done *virtute officii*. There is, however, some conflict in the authorities on the question of whether a surety is liable on an official bond for acts of the principal *colore officii*. Our own court however, has definitely and positively adopted and approved that line of authorities which holds the surety liable for the acts of the principal done *colore officii*. *State v. McDaniels*, 78 Miss, 1, *Lizana et al. v. State*, 69 So. 292. In *Lizana et al. v. State*, *Supra*, the court in recognizing the great contrariety of opinion on this subject says, speaking through Justice Cook: "Without regard to the rule in other jurisdictions, this court has held that official acts, like the acts in the present case, are actionable."

And then quoting from *State v. McDaniel*, *supra*, he says: "What the magistrate does *colore officii*, his sureties are liable for.

We take it from the authorities of our own court, therefore, that if McCormick received the money *colore officii*, the surety is liable. Let us see, therefore, if McCormick received the money *colore officii*. The distinction between the two classes of acts, that is, acts *virtute officii* and acts *colore officii*, is thus stated by PRATT J., in *Peoples v. Schuyler*, 4 N. Y. 187:

"Acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them."

The particular claim of the surety company in this case is that McCormick's office "Gave him no authority" to receive this money. The proof abundantly shows, however, that while it was true there was an ordinance directing Rivers to deposit this money direct in the city depository, and while it was also true that there was no express authority for McCormick to receive the money, at the same time the ordinance in question had never been observed by the city, or enforced by it, and on the contrary, it had been the general understanding that the city clerk should handle this fund. The city clerk had handled the fund, and was handling the fund at the time the surety company made this bond on which suit was brought. The city clerk, McCormick, when he assumed the duties of this office assumed this as one of the duties incident to the work of the city clerk, and entered immediately upon the performance and discharge of this particular duty. Rivers paid the money to McCormick as city clerk. He paid it to him at his office in the city hall, which was the office of the city clerk. McCormick received it as a city clerk, and received it because he was



a city clerk, and received it under the authority of right which he was assuming as city clerk. After having received it he entered it on his cash book, which was kept by him as city clerk in the city clerk's office, and he deposited the fund as city clerk in the city depository. His entire dealing and connection with the fund was through his office as city clerk, and under color of his office as city clerk. We are free to confess, therefore, that if this money which was admittedly the city's money, was not received by McCormick under color of his office as city clerk, we can conceive of no case in which he could have acted *colore officii*, in contradistinction to his acts done *virtute officii*. *People v. Vanness*, 21 Pac. 554.

Counsel have cited many authorities seeking to support their contention that the surety is not liable in this case. The court will find that the authorities of different states are hopelessly in conflict on the question presented here. Some courts hold that the surety is only liable for acts of the principal done *colore officii* and *virtute officii*. We are relieved, however, of the necessity of examining these various and conflicting authorities from the courts of other states, because our own court has definitely and positively adopted and approved that line of authorities which holds the surety liable for the acts of the principal done *colore officii*. *State v. McDaniels*, 78 Miss. 1; *Lizana et al. v. State*, 69 So. 292.

In examining the authorities from our own court cited by counsel, the court will observe that in not a single one of them did the court deny a recovery against the surety merely because the funds were received by the principal *colore officii* instead of *virtute officii*, but in each and every one of the cases cited a recovery against the security was denied either because the express terms of the conditions of the bond prohibited a recovery or because the act of the principal on which a recovery was sought, was outside of and different in nature and separate and distinct from the

official capacity in which the officer was bonded, and was not even an act performed by the officer *colore officii*.

The case of *Lewis v. Johnson*, Walker's, page 260, was an action wherein it was sought to hold the clerk's sureties liable for an act which was outside of and separate and distinct from the official capacity in which he was bonded, and was not even an act performed by him *colore officii*. The case of *Matthews v. Montgomery*, 25 Miss. 150, is likewise a case where the act for which recovery was sought against the sureties and outside of and different in nature and separate and distinct from the official capacity in which the officer was bonded, and could not even be deemed an act performed by the clerk *colore officii*.

The case of *Furlong v. State*, 58 Miss. 717, was a suit brought in behalf of the state against Furlong and his sureties on the said Furlong's bond as sheriff, seeking to recover certain money which Furlong had collected by preferring false claims under a statute which gave him an allowance for feeding and caring for prisoners. The court will note particularly that this was not a case where funds were paid to the principal to be paid over by the principal to another party. It was a case wherein the sheriff had simply "padded" his claims for feeding prisoners and had thereby received for his own account money out of the county treasury. He did not receive the money for the purpose of paying it to another; his bond was conditioned that he should "punctually pay over all monies coming into his hands by virtue of said office (sheriff) to the party or parties entitled thereto according to law." The decision of the court in this case wherein a recovery against the surety was denied, was based not on the ground that the money which the sheriff collected on such false claims was received by him *colore officii*, and not *virtute officii*, but it was based on the ground that such act of the sheriff collecting such money was not within the express terms of the condition of the bond. In other words, the decision was based on the ground that

the condition of the bond by its express language prohibited a recovery against the surety because the court said that the bond was intended only as security for such money as might be paid to the sheriff or entrusted to him to be paid over by him to another. In rendering its decision on this ground, the court said:

"It is plain that the clause in the condition of the bond to pay over all monies coming into his hands by virtue of said office to the party entitled has in contemplation money coming into the hands of the sheriff as, a collector or custodian for another than himself, and has no reference to money which he might collect for himself. The remaining stipulations of the conditions have reference only to the performance of official duty by the sheriff. The matter complained of in this connection is neither within the terms of the condition of the bond, nor within the contemplation of the law which provided it."

The distinction between *Furlong* case and the case at bar is apparant. The case of *Brown v. Phillips*, 6 Smedes & Marshall, 51, is one wherein suit was brought against the sheriff and his sureties on his official bond to recover the amount of a bill for advertising which the publisher claimed the sheriff had incurred in procuring advertisements of sales for taxes. Again the court will observe that this is not a case as is the case at bar where money was paid to the principal to be paid over by the principal to another party. Neither is it a case where the principal received money under color of his office to be paid over by the principal to another party. It has no application whatever to the facts of the case at bar. In the case cited the court held that the condition of the tax collector's bond prohibited a recovery against the surety.

The distinction, therefore, between this case and the case at bar, will be readily obvious to the court. We respectfully submit, therefore, that on an analysis of the foregoing cases cited by counsel, no one of them appears

to be in point here. All of the cases are supported by an entirely different state of facts, and are decided on a wholly different ground from the ground on which recovery is sought in the case at bar. No one of the cases cited by counsel is in conflict with the cases of *State v. McDaniels, supra*, and *Lizana et al. v. State, supra*, which latter cases plant our court in support of the theory that the surety must be held for acts of the principal done *colore officii*.

We respectfully submit, therefore, that under any one of the theories discussed, the surety should be held liable, and this case should accordingly be affirmed.

SYKES, J., delivered the opinion of the court.

The appellee, Yazoo City, filed suit in the chancery court of Yazoo county against Hugh W. McCormick and the appellant company, surety on the official bond of McCormick as city clerk of Yazoo City. A decree was rendered in favor of the city for the sum of nine hundred, forty-two dollars and fifty-nine cents and the surety company alone prosecutes this appeal to this court.

The bond made by the appellant company is in the usual form of surety bonds. The condition of the bond alleged to have been breached is that portion reading as follows:

“That if the said Hugh W. McCormick shall from the 5th day of December, 1910, well and faithfully perform all the duties of the said office.”

The bill alleges that the said McCormick failed and neglected and refused to account for and pay over to the complainant the sum of nine hundred forty-two dollars and fifty-nine cents. The testimony in the lower court was conflicting as to whether or not the city clerk, as a matter of fact, received this money; but the chancellor decided this fact in favor of the appellee. We will therefore state the facts as found by the chancellor.

During the life of the bond in suit, and while McCormick was the city clerk, a Mr. Rivers, the superintendent of the street car line in Yazoo City, which line belongs to the city, from time to time paid over to McCormick, city clerk, the amount of nine hundred forty-two dollars and fifty nine cents. This amount McCormick failed to turn over to the city, but appropriated it to his own use. The testimony in the case shows that the only moneys which could be collected by the city clerk were those due as city tax privilege licenses. At the time of the alleged defalcation there was an ordinance of the city, duly and legally adopted, and in full force and effect, section 3 of which is as follows:

“All moneys collected by the said Rivers shall be paid into the city depository, to the credit of the street railway fund, and no money shall be paid out except upon warrant of this board.”

One of the banks had been regularly selected as a city depository. Despite the above ordinance, the testimony shows that Mr. Rivers had ignored the same, with the knowledge of the city officials, and had made a practice of turning over to the city clerk the street railway money.

It is the contention of the appellant surety company that, since the payment of this money by the superintendent of the street car line to the city clerk was in direct violation of the city ordinance in effect when these payments were made, and since the only moneys which could be collected by the city clerk were those for privilege tax licenses, then this money was not paid to the clerk either *virtute officii* or *colore officii*, and, therefore, it was not in the contemplation of the surety on this bond, and that it could not be held liable for this money.

After a most careful consideration of the case and all of the authorities cited in the briefs of learned counsel, and also of other authorities not cited, we are of the opinion that the surety company cannot be held liable. We do not think there was any real or apparent authority

vested in McCormick, the city clerk, to receive these moneys, and this fact was well known to Mr. Rivers when he paid the same to the clerk. It is the contention of appellee that the money was paid to the city clerk under color of his office. A careful examination of all the authorities in Mississippi, and those which have fallen under our observation in other states, however, leads us to the conclusion that before the bondsmen can be held in a case of this character there must at least have been some apparent authority for the receipt of the money by the official whose bond is in suit. In *Adams, Revenue Agent, v. Williams*, 97 Miss. 113, 52 So. 865, 30 L. R. A. (N. S.) 855, Ann. Cas. 1912C, 1129, the moneys came into possession of Williams by virtue of his being the treasurer of the levee board. In the case of *Lewis v. State*, 65 Miss. 468, 4 So. 429, it was the duty of the circuit clerk to issue witness certificates under certain circumstances. He had the real authority to issue these certificates in proper cases; he therefore had apparent authority to issue any witness certificates, and the forged certificates in that case were therefore issued under his apparent authority or *colore officii*. In the case of *Adams, Revenue Agent, v. Saunders*, 89 Miss. 799, 42 So. 602, 119 Am. St. Rep. 720, 11 Ann. Cas. 327, Saunders was the tax collector of Oktibbeha county, and had the apparent authority to collect the taxes therein collected by him. These taxes were therefore collected by him *colore officii*. In the case of *State v. McDaniel*, 78 Miss. 1, 27 So. 994, 50 L. R. A. 118, 84 Am. St. Rep. 618, the mayor was acting within the apparent scope of the authority of his office, in the line of his official duty. His action was merely in excess of his jurisdiction, and, for that reason, what he did was done *colore officii*. The same rule was re-announced and affirmed in the case of *Lizana v. State*, 109 Miss. 464, 69 So. 292.

Under the above ordinance it is perfectly clear that the city clerk had no more apparent authority to receive this money from Rivers than did the city marshal or any other

city official. He had no more right to receive it than a circuit or chancery clerk would have to go out and collect taxes. In the case of *Matthews v. Montgomery*, 25 Miss. 150, a suit against the sureties on the official bond of the clerk of Madison county, wherein it was alleged that the clerk had collected certain fees belonging to the sheriff, the court, in part, said:

“The only question made is whether the action can be maintained on the bond. The bond is conditioned that the clerk shall faithfully perform those duties required of him by law. It is no part of his duties to collect or receive the dues of other officers of the court. He is not in such case the officer of the law to receive the fees, or the agent of the officer for that purpose, but only the agent of the party paying.”

See, also, *Lewis v. Johnson*, Walk. 260; *Furlong v. State*, 58 Miss. 717; *Brown v. Phipps*, 6 Smedes & M. 51; *Brown v. Mosely*, 11 Smedes & M. 354.

It was held in the case of *Brooks Oil Co. v. Weatherford*, 91 Miss. 591, 44 So. 928, that where a judgment debtor pays money to the sheriff in order to satisfy a judgment, but before any execution has been placed in the hands of the sheriff, this constituted no payment of the judgment. The court, in part, said:

“When the payment was made to the sheriff, he was simply the agent of Weatherford, and, if he did not pay it over, Weatherford must look to him for it.”

In the case of *Alcorn v. State*, 57 Miss. 273, it was held that the sureties on the bond of a chancery clerk are not liable for money received by him as a commissioner, though his appointment as such commissioner was by virtue of his office as chancery clerk. See, also, *Denio v. State*, 60 Miss. 949. The case of *San Luis Obispo County v. Farnum*, 108 Cal. 562, 41 Pac. 445, is similar in principle to the case under consideration:

“A cause of action is stated against Farnum, independently of the allegations relating to the bond which

may be treated as surplusage. That the money in question, having been collected by the tax collector for licenses, belonged to the county, is not questioned; but that it came to the hands of defendant Farnum as auditor is a conclusion of law wholly unsupported by the facts found. There is no provision of law authorizing the auditor to receive it, nor any authorizing the tax collector to pay over such moneys to him, or to any one except the county treasurer. Having received the money, it was Farnum's duty to pay it over to the treasurer; but such duty did not arise out of his office, nor was it at all different from the duty which would have rested upon him to pay it over had he been a plain citizen, not holding any county office. Farnum did not even receive the money *colore officii*, for under no circumstances was he authorized or required by law to receive it. The condition of the bond sued upon is not that Farnum should be personally honest, or pay his personal debts, or discharge those private duties and obligations which he may have assumed; but the condition is that he 'shall well and faithfully perform all official duties required of him by law.' The 'official duties' here specified are the duties required by law of the county auditor, and none other."

The overwhelming weight of authority is in line with the decision above quoted. Before an act is done under color of office there must be an appearance of right given under the law to do the act; or, in other words, there must be at least apparent authority for the doing of the act. When the city ordinance provides the only way for the handling of the street car fund, then there certainly can be no apparent authority for the payment of this fund to the city clerk. Rivers directly violated the ordinance when he did so. The city clerk violated the ordinance when he received the money. It was the duty of Rivers to have paid this money into the city depository. He failed so to do, but by paying it over to the city clerk he thereby merely



made the clerk his agent to pay the money into the proper depository.

The money was not paid to McCormick either by virtue of his office or under color of his office. Before the surety can be held liable on this bond it is necessary for the city to prove that the money came into the hands of the city clerk either *virtute officii* or *colore officii*, and this the proof fails to show. The decree of the lower court is reversed, and a decree will be entered here in favor of the appellant.

*Reversed, and judgment here.*

WESTERN UNION TELEGRAPH CO. v. HAZLEHURST OIL MILL  
& FERTILIZER CO.

[77 South. 187, Division A.]

1. SALES. *Cancellation. Validity.*

Where the seller received the purchaser's telegram of confirmation of sale within the time stipulated, before the purchaser received the seller's telegram of cancellation, such attempted cancellation was void.

2. TELEGRAPH AND TELEPHONES. *Receipt of message. Notice by telegraph company.*

The fact that a telegram confirming a sale to the sender of certain cotton was received by the seller within the time agreed upon, and the purchaser believed that cancellation by the seller was received by him before confirmation of sale was received by the seller, did not render the telegraph company liable for not having notified him of the delivery of the telegram; such notice not being necessary, except in case of a repeated message.

APPEAL from the circuit court of Copiah county.

HON. D. M. MILLER, Judge.

Suit by the Hazlehurst Oil Mill & Fertilizer Company against the Western Union Telegraph company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*McNair, Brady & Dean* and *J. B. Harris*, for appellant.

*R. N. & H. B. Miller* and *R. H. & J. H. Thompson*, for appellee.

SYKES, J., delivered the opinion of the court.

The appellee, Hazlehurst Oil Mill & Fertilizer Company, filed suit in the circuit court of Covich county against the appellant, Western Union Telegraph Company, for the sum of one thousand five hundred dollars, for damages alleged to have been sustained by the appellee oil mill because of negligent delay in the transmission and delivery of a telegram sent by appellee to one W. F. Hoy, at Prentiss, Miss., upon October 13, 1915.

The necessary facts relating to this suit are as follows: On October 12, 1915, the Board of Trustees of the Mississippi Penitentiary sold ten cars of cotton seed to W. F. Hoy. Mr. Covington, the manager of the appellee oil mill at Hazlehurst, ascertained this fact, and on the following morning (October 13th) telephoned Mr. Hoy to know what he would take for the seed. Covington and Hoy agreed upon a price of thirty-six dollars a ton, and that the oil mill and Hoy should confirm by telegram the terms of this sale, each to the other. About 10:30 o'clock that morning the oil mill filed with the appellant company a telegram in these words:

"W. F. Hoy, Prentiss, Miss. We confirm purchase from you ten to fifteen cars state cotton seed at thirty-six dollars f. o. b. cars. [Signed] HAZLEHURST OIL MILL & FERTILIZER Co."

Mr. Hoy, about the same time, filed his telegram of confirmation in the following words:

"Hazlehurst Oil Mill & Fertilizer Co., Hazlehurst, Miss. Confirming sale seed thirty-six dollars ton to you f. o. b. state farm. [Signed] W. F. Hoy."

The appellee oil mill received Mr. Hoy's telegram the afternoon of the 13th. Mr. Hoy, however, did not receive the telegram of the appellee oil mill until the morning of the 14th, about 9:20 o'clock. After the filing with the telegraph company of both these messages the price of cotton seed advanced considerably. On the night of the 13th, Mr. Hoy had a telephone conversation with Mr. Covington, the manager of the appellee oil mill, in which Hoy stated that he had not received his telegram confirming the sale. Mr. Covington told him that he had filed the same on the morning of the 13th and insisted that the cotton seed were his; that the sale had been duly consummated. The result of the conversation was that Mr. Hoy agreed with Mr. Covington to wait until the next morning for the receipt of appellee's telegram. The following morning, Mr. Hoy went out to the fair grounds at Prentiss, and, about 9 o'clock, wrote a postal card to the appellee company in which he stated that it was now 9 o'clock; that he had not received the telegram confirming the sale; and that he would wait until 10 o'clock for a confirmation; that if he did not receive this confirmation by 10 o'clock he would sell the seed elsewhere.

The telegram of the appellee company to Mr. Hoy reached Prentiss about 9 o'clock that morning, was sent out to the fair grounds for delivery, and was telephoned to Mr. Hoy by the agent of the telegraph company at 9:20 o'clock. Mr. Hoy is not certain as to the exact time this message was telephoned to him, but the testimony of the agent of appellant company is positive and undisputed that he delivered it over the phone to Mr. Hoy, himself, at 9:20 o'clock the morning of the 14th. Some time on either the 14th or 15th, the record is not clear as to the exact day, Mr. Hoy sent a telegram to the appellee oil mill, stating that "confirmation too late to accept; have sold elsewhere." The testimony further shows that,

after Mr. Hoy had received the telegram of confirmation on the morning of October 14th he and Mr Covington had another telephonic conversation, either that day or on the 15th, in which Mr. Hoy insisted the sale was off, and in which Mr. Covington insisted that it was binding. An agreement was then reached between them whereby Mr. Hoy sold the same amount of cotton seed to the appellee at an advance of two dollars per ton. The appellee company had an agent at Prentiss, and this contract of sale was reduced to writing. Under this contract Mr. Hoy had shipped to the appellee company the identical seed which he had bought from the Board of Trustees of the State Penitentiary, and which he had agreed to sell the appellee for thirty-six dollars a ton.

The jury rendered a verdict in favor of the plaintiff for five hundred and twenty-three dollars and seventy cents, which amounted to the two dollars a ton additional price paid by appellee for the seed. Judgment was entered in the circuit court for this amount, from which judgment this appeal is prosecuted here. There are numerous reasons assigned why the case should be reversed, but it is only necessary for us to consider one proposition.

The uncontradicted testimony in the case shows that the telegram by which Mr. Hoy attempted to cancel or annul the contract was not received by the appellee until after Hoy had received its confirmatory telegram. This attempted cancellation was of no binding force or effect until it had been received by the sendee oil mill at Hazlehurst. 1 Elliott on Contracts, section 34. In fact, this telegram does not seem to have been sent, according to its date as shown in the record, until October 15th. Under either aspect, it is quite certain that Hoy had received the message from the appellee company confirming the sale before this company had received his message canceling or revoking it.

It is also shown in the testimony that, at the time of the telephonic conversation, either on the afternoon of October 14th or 15th, in which Mr. Hoy again attempted to cancel or revoke the contract of sale, he had received appellee's message of confirmation. In other words, appellee's message had served its purpose. Mr. Hoy, by his postal card, had agreed to wait until 10 o'clock on the morning of the 14th for this message; the testimony shows that he received it before that time. Therefore, after its reception by him at 9:20 on the morning of the 14th, the contract of sale was just as binding upon Hoy as it could possibly have been had he received the message promptly on October 13th. It is not necessary for us to decide in this case whether or not, upon the reception of the two confirmatory telegrams by the parties to the contract, the contract then became complete. The confirmatory telegram of the appellee company to Mr. Hoy was not what is commonly called a "repeated message;" that is to say, the appellee had not paid the additional charges whereby it was to be notified when the message was delivered. Consequently, there was no duty resting upon the appellant company to notify appellee at what time as a matter of fact this message was received by Mr. Hoy. All of the rights and liabilities of the parties in this case arising out of the sending of these telegrams were completely settled when Mr. Hoy received his confirmatory telegram before 10 o'clock on October 14th. The appellee, had it so desired, could have ascertained the fact that its telegram had been delivered to Mr. Hoy on the morning of the 14th. It follows therefore that, even conceding for the purposes of this decision that the appellant company was guilty of negligence in the transmission of the message to Mr. Hoy, this negligence was not the proximate cause of appellee's having to pay the advanced price it did for this cotton seed.

The judgment of the lower court is reversed, and judgment will be entered here in favor of the appellant.

*Reversed, and judgment here.*

## LIBERTY BANK v. WILSON ET AL.

[77 South. 145, Division A.]

1. **DEEDS. Construction. Estate created. Applications of rule in Shelley's Case. Code 1906, section 2776.**

Neither the rule in Shelley's Case nor section 2776, Code 1906, abolishing it have any application where the grant to the grantee is not "for life with remainder to the heirs of her body," but to her and the heirs of her body.

2. **DEEDS. Estate tail. Conversion into fee simple.**

At common law a grant to A and the heirs of his body conveyed a fee conditional; under the statute *de bonis conditionalibus* it conveyed a fee tail, but under section 2765, Code 1906, Hemmingway's Code, section 2269, it conveys a fee simple.

3. **JUDGMENT. Parties. Persons not before the court.**

Whether or not a provision in a deed that "in the death of my daughter W, without heirs born to her, then this land revert to one of my heirs," is a gift over of the land in the event of the death of W without such heirs, cannot be presented to the court for decision until that event happens and the person to then take, should this provision be held to be a gift over, is before the court.

APPEAL from the chancery court of Amite county.

HON. R. W. CUTRER, Chancellor.

Suit by the Liberty Bank against Mrs. Hattie C. Wilson. From a decree sustaining a demurrer and dismissing the bill, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Price & Price and C. T. Gordon, for appellant.

Bramlette & Bramlette, for appellees.

SMITH, C. J., delivered the opinion of the court.

On the 28th day of October, 1894, W. J. Hurst executed and delivered to his daughter, Mrs. Hattie C. Wilson, a deed reciting that:

“For and in consideration of the love and affection I have for my daughter, Mrs. Hattie C. Wilson, I hereby convey and warrant unto her and the heirs of her body, the following described land in said county and state, to wit (here describing the land), a part of this consideration that in the death of my daughter, Mrs. Hattie C. Wilson, without heirs born to her, then this land revert to one of my heirs.”

Appellant claiming to be the owner of the land in fee by mesne conveyances from Mrs. Wilson, who is still living, exhibited its bill in the court below against Mrs. Wilson, her three children, Maybe, Minn, and P. N. Wilson, W. D. Hurst, Eugene Hurst, and J. H. Hurst, who are alleged to be heirs of W. J. Hurst, deceased, alleging that they claim an interest in the land by virtue of the deed from W. J. Hurst to Mrs. Wilson, and prayed that their claim thereto be canceled. The only response to this bill was made by the three children of Mrs. Hattie C. Wilson by way of demurrer, which demurrer was sustained and the bill dismissed as to them; this being the only order or decree entered in the cause.

Appellees, who are the children of Mrs. Wilson, claim as remaindermen under the deed to Mrs. Wilson from Hurst, that is, that this deed conveys an estate for life to Mrs. Wilson with remainder in fee to the heirs of her body, and cite in support thereof section 2776, Code of 1906, by which the rule in Shelley’s Case is abolished, and which provides that:

“A conveyance or devise of land or other property to any person for life, with remainder to his heirs or heirs of his body, shall be held to create an estate for life in such person, with remainder to his heirs or heirs of his body, who shall take as purchasers, by virtue of the remainder so limited to them.”

Neither the rule in Shelley's Case nor the statute abolishing it have any application here for the reason that the grant is not to Mrs. Wilson "for life with remainder to the heirs of her body," but to her and the heirs of her body.

At common law a grant to A. and the heirs of his body conveyed a fee conditional. Under the statute *de bonis conditionalibus* it conveyed a fee tail, but under section 2765, Code of 1906, Hemingway's Code, section 2269, it conveys a fee simple (*Jordan v. Roach*, 32 Miss. 603; *McKenzie v. Jones*, 39 Miss. 230; *Sudduth v. Sudduth*, 60 Miss. 366; *Wallace v. Wallace*, 75 So. 449); and such is the estate here conveyed to Mrs. Wilson, and now vested in appellant.

Whether or not the provision in the deed that "in the death of my daughter, Mrs. Hattie C. Wilson, without heirs born to her then this land revert to one of my heirs" is a gift over of the land in the event of Mrs. Wilson's death without such heirs, is not presented to us for decision and cannot be unless and until that event happens and the person to then take, should this provision be held to be a gift over, is before the court.

The decree of the court below will be reversed, the demurrer will be overruled, and the cause remanded, with leave to appellees to answer, if they so desire, within thirty days after the filing of the mandate in the court below.

*Reversed and remanded.*

---

WESTERN UNION TELEGRAPH CO. v. LOWDEN.

[77 South. 145, Division A.]

TELEGRAPHS AND TELEPHONES. Negligence. Parties who may recover.

*Undisclosed principal.*

An undisclosed principal cannot recover damages for the negligent failure of a telegraph company to promptly deliver a message to his agent.



APPEAL from the circuit court of Bolivar county.

HON. W. A. ALCORN, Judge.

Suit by F. O. Lowden against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*J. B. Harris*, for appellant.

*Sillers & Silles* and *Robt. B. Mayes*, for appellee.

HOLDEN, J., delivered the opinion of the court.

Appellee, Lowden, sued the appellant telegraph company for alleged losses sustained by him on account of negligence of the telegraph company in failing to promptly deliver a telegram to J. T. Crockett, who was the agent of appellee at South Bend, Ark. The telegram was sent by Humphrey & Company from Rosedale, Miss. On account of the failure to promptly deliver this message to Crockett, who was the agent of the appellee, F. O. Lowden, the cotton mentioned in the telegram was sold by Lowden at a loss of eight hundred and thirty-four dollars, for which amount a judgment was rendered in the lower court.

The appellant telegraph company assigns several errors of the lower court upon which a reversal of the judgment is asked, but we deem it necessary to notice only one of the contentions presented here, as a decision of this point will settle the main controversy and end the case.

The record shows that the appellee, Gov. F. O. Lowden, was the undisclosed principal of the sendee, J. D. Crockett, to whom the telegram was addressed. The telegram in question was sent by Humphrey & Co. to the said Crockett, and dealt with the purchase by the former of one hundred and eighteen bales of long staple cotton. For the negligence in failing to deliver the telegram promptly to the sendee, Crockett, who was the agent for the appellee, Low-

den, there was a suit and recovery of two thousand two hundred dollars, by the sender, Humphrey & Co., against the appellant, Western Union Telegraph Company, which judgment was affirmed by this court and reported in 71 So. 880. The recovery in that case by the sender, Humphrey & Co., was for the failure to obtain the cotton mentioned in the telegram; and the present suit is by Lowden, undisclosed principal of sendee, Crockett, for the purpose of recovering damages for a failure to sell the cotton to Humphrey & Co., which is alleged to have been caused by the negligent failure of the telegraph company to promptly deliver the telegram.

The appellee, F. O. Lowden, being an undisclosed principal of the sendee, Crockett, cannot recover in this suit against the telegraph company for its negligence in failing to promptly deliver the message. This rule seems to be well settled, the reason for which rests upon a sound basis. The rule that the undisclosed principal cannot recover damages for the negligent failure of a telegraph company to promptly deliver a message to his agent is announced and established in this state in the case of *Stuard v. Western Union Telegraph Co.*, 106 Miss. 883, 64 So. 835. Also see *Western Union Telegraph Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) at page 685, where it is said by the court:

"It is contended that because the telegraph company owes the duty of care to receive and transmit messages correctly to the addressees, to the senders, and to the undisclosed principals of the senders, it therefore owes it to the undisclosed principals of addressees. But the duty to the undisclosed principals of senders rests on the fact that contracts have been made between the senders and the telegraph company, and that in the negotiation and enforcement of contracts the law places undisclosed principals in the shoes of their agents, so that the telegraph company, which must know the law, is charged with notice,

and may reasonably anticipate that its misrepresentations may affect them. It has no contracts with addressees, and hence it is not charged by the law with notice that their undisclosed principals, or others to whom they may display the messages, will probably be affected by them."

Upon the facts in this case the lower court should have granted a peremptory instruction for the telegraph company, and for the error in failing to do so the judgment of the lower court is reversed, and judgment for the appellant entered here.

*Reversed and judgment here.*

---

BERNSTEIN v. YAZOO & M. V. R. R. Co.

[77 South. 146, Division A]

*CARRIERS. Live Stock. Filing claim of loss. Waiver of stipulations.*

The provision of a contract for the shipment of live stock, that the shipper shall file notice of loss within ten days of delivery is waived where the proper agent of the carrier received and accepted oral notice, acted upon it, and inspected the injured stock shortly after their arrival, and made notation upon the way bill of the injuries and damages to the stock at the time.

APPEAL from the circuit court of Adams county.

HON. ROBT. E. JACKSON, Judge.

Action by A. H. Bernstein against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

*Chas. F. Engle, B. W. Crawford & Beekman Laub,*  
for appellant.

*Mayes, Wells, May & Sanders,* for appellee.

HOLDEN, J., delivered the opinion of the court.

This case is now here the second time on appeal from the circuit court of Adams county, where the circuit judge again granted a peremptory instruction to find for the appellee railroad company; the facts being the same in the present appeal as in the former. *Bernstein v. Yazoo, etc., R. Co.*, 111 Miss. 697, 72 So. 132.

In the former appeal we reversed the judgment of the lower court upon the specific ground that the case came within the rule announced in the *Bell Case*, 111 Miss. 82, 71 So. 272, holding that the ten-day notice stipulation in the contract of shipment was void, for the reason that the shipper was not offered the choice of two rates, a higher and lower, rate, the benefit of which was necessary as a consideration to uphold the ten-day notice stipulation, and we did not there pass upon the question of waiver. Since our decision in the case of *Bernstein v. Railroad Co.*, *supra*, we held in the case of *Railroad Co. v. Davis*, 112 Miss. 119, 72 So. 874, that the ten-day notice stipulation was reasonable and valid, and that in the *Davis Case* the shipper was offered the benefit of two rates, and accepted the lower, and he not having filed his claim within the required ten days' time, and, the particular facts in that case not showing that the requirement had been waived by the acts of any authorized agent of the railroad, the shipper was precluded from recovery for the alleged injuries to the stock in transit. But we have held in no case that the railroad company could not waive the ten-day notice stipulation in the contract where the proper agent of the railroad received and accepted oral notice, acted upon it, and inspected the injured stock shortly after their arrival, and made notation upon the waybill of the injuries and damages to the stock at the time.

In the case before us now it appears from the testimony that within a few hours after the arrival of the car of stock at Natchez the agent was notified orally of the inju-

ries and damage to the stock, and he accepted this notice and inspected the stock and made notations of the injuries and claim upon the waybill. Therefore it is plain that the facts constituting the waiver in the case before us now are quite different from the facts offered in support of the waiver in the *Davis Case*, *supra*.. The contention of the appellee railroad in the instant case that the *Davis Case* holds that the carrier, through its authorized agents, cannot waive the ten-day notice stipulation, or that the carrier did not waive the stipulation in the case now before us, is erroneous. Waiver of this stipulated written notice in the contract may be made by the carrier where the facts show that such oral notice was given to, accepted, and action taken dealing with the claim by the authorized agent of the railroad company. In *New Orleans, etc., R. Co. v. Wood*, 112 Miss. 614, 73 So. 615, where the facts with reference to the waiver are very similar to the facts in the case before us now, this court held that this state of facts constituted a waiver of the ten-day notice clause by the carrier. See, also, *Illinois, etc., R. Co. v. Rogers & Hurdle*, 76 So. 686, decided by this court November 19, 1917; *Illinois, etc., R. Co. v. Atkinson*, 113 Miss. 678, 74 So. 616; *Lasky v. Southern Express Co.* 92 Miss. 268, 45 So. 869.

The rule announced in the *Bell Case*, *supra*, holding that the ten-day notice stipulated in the contract was void because it was without consideration, in that the benefit of the choice of two rates was not offered to the shipper, has not yet been overruled by us. The rule announced in the *Davis Case*, *supra*, which holds that this notice stipulation was reasonable and valid, and was not waived in that case, remains undisturbed; and we adhere to the holding that the facts there did not constitute a waiver of the notice required; but we decide now in the present case before us that the facts here shown by the appellant did constitute a waiver of the ten-day notice stipu-

lation in the contract of shipment. Therefore the granting of the peremptory instruction to the appellee was error, for which we must reverse and remand.

*Reversed and remanded.*

---

ALDRIDGE v. ALDRIDGE

[77 South. 150, Division A.]

1. **MARRIAGE.** *Presumptions. Divorce from former wife.*

A marriage duly proved will be presumed valid, although a former wife of the man may be still living and there be no evidence of a divorce from her, the burden of proof to show the negative fact that there was no divorce being on the party who denies the validity of the second marriage.

2. **DIVORCE.** *Alimony. Necessity of valid marriage.*

There is no foundation for alimony on the granting of a divorce, where each of the parties to a purported marriage had been married previously and not divorced and both of the former spouses were living, since in such case the last marriage was void.

3. **DIVORCE.** *Alimony. Necessity of valid marriage. Code 1906, section 1673. Hemmingways Code, section 1415.*

Under Code 1906, section 1673, Hemmingways Code, section 1415, providing that, when a divorce shall be decreed, the court may, in its discretion, as may seem equitable and just, make all orders touching the maintenance and alimon. of the wife, it would not be equitable and just to award alimony on the granting of a divorce to a woman who was not legally married to the defendant, but who to all intents and purposes, was simply his mistress, although she had aided him in the accumulation of what property he had.

APPEAL from the chancery court of Washington county.  
HON. E. N. THOMAS, Chancellor.

Suit by Jennie Aldridge against J. E. Aldridge. From a decree for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*W. A. Henry*, for appellant.

Was the "marriage," between complainant and defendant in Greenville, in July, 1914, a valid marriage? On this proposition hangs all the law applicable to this case.

If the marriage was legal, and made them husband and wife, then the decree made by the court below may be sustained; otherwise, there must be a reversal and decree here for the defendant, certainly on the question of counsel fees and support, for, without the marriage relation, alimony cannot be awarded, marriage being the very foundation of the wife's right to support.

In this state of case, the unbroken authority in Mississippi is: A marriage duly proved will be presumed valid, although a former spouse be living and there be no evidence of a divorce, the burden of proof to show the negative fact that there was no divorce being on the party who denies the validity of the marriage, and two marriages being established by proof, the presumption would arise in favor of a divorce, in order to sustain the second marriage, and the law is so positive in requiring a party who asserts the illegality of a marriage to take the burden of proving it, that such requirement is enforced even though it involves the proving of a negative. *Railway Co. v. Beardsley*, 79 Miss. 423; *Hull v. Rawls*, 27 Miss. 471; *Gibson v. State*, 38 Miss. 313; *Spears v. Burton*, 31 Miss. 457, 554; *Collins v. Wilkie*, 48 Miss. 496; *K. of P. v. Tucker*, 92 Miss. 505. See also *State v. Bennett*, 100 Miss. 684, where the cases are reviewed and the distinction in the rule in civil and criminal cases defined. On page 695, the court says:

"It is the well-established rule in civil cases that, in attacking the validity of a marriage ceremony on the ground of a former marriage, the burden of proof is

116 Miss.]

Brief for appellant.

upon the attacking party to show that there was no divorce from the first wife. This is the well-established rule in civil cases but it is equally as well established that the rule does not apply in prosecutions for bigamy."

Now it is clear that complainant is attacking the validity of the marriage of Milton and herself by setting up that several years prior to their marriage, Milton Streeter had married Mollie Brown, and that Mollie was alive when complainant and Milton Streeter wedded, and therefore the later marriage was a nullity, and that the subsequent marriage to defendant Aldridge was legal. But the law says: "You will not be permitted to annul a solemn marriage contract, and bastardize the issue thereof, unless you go a step further and show that no divorce was had dissolving the former marriage."

Surely, the law as adjudicated for ages will not be relaxed in favor of complainant, who does not deny the proof that, at the time of the alleged marriage to Aldridge she knew she had a living husband and was advised that he had a living wife.

Presumptions may be wholly disregarded in this case, however, for the proof is clear and convincing that the defendant had a living wife at the time of the alleged marriage with complainant, that they lived together as husband and wife for several years, were generally recognized as husband and wife, and two children were born to them during their wedded life. 14th A. & E. Enc. of Law, page 525, states the law to be: "Any person present at the marriage may testify there to whether a third party of the celebrant, and, in general, even the parties themselves; See authorities there cited. See also Cyc. page 1198, and authorities cited. *Henderson v. Cargill*, 31 Miss. 409.

Now if a marriage can be proved by the declaration of the parties, surely no court would hold that the parties



themselves living could not testify to the marriage. "Proof that a man and woman cohabited as husband and wife is evidence from which a court or jury might infer the existence of a marriage between them, and, if un rebutted, would necessarily be conclusive. *Ib.* 419. *Lake v. Lake, et al.* No. 18002, of Supreme Court of Miss.; *Williams v. Drinkhouse estate* (a Pennsylvania case), 24 Atl. 1083; *Rust v. Oltmer* (a New Jersey case), 67 Atl. 337; *In Re Richards Estate* (a California case) 65 Pac. 1034.

On the question as to whether it was competent to award counsel fees and support, against the defendant in this case under the proof in the case, I beg to say:

The *McFarland case*, 64 Miss. 449, was a suit by the wife against the husband for alimony (not seeking a divorce), alleging the marriage and that he had driven her from home and he had refused to receive her back or make provision for her support. The husband answered, denying he had driven her from home, but expressed the hope that she would not return. Thereupon, the wife moved for alimony *pendente lite* and an attorney's fee. The Chancellor heard oral proof to determine amount to be awarded. The attorney for the husband urged that oral proof was not admissible. The supreme court ruled otherwise.

The *Reed case*, 85 Miss. 126, was a suit for divorce and alimony. The answer denied the validity of marriage and alleged that complainant, at the time of her marriage to defendant, was married to another and had obtained no divorce, and also denied grounds for divorce. On application for alimony *pendente lite*, defendant requested that the hearing be continued until he could take testimony which was denied; whereupon defendant offered evidence to show complainant's marriage to one Brooks before her pretended marriage to defendant, which evidence was excluded, and from a

decree allowing alimony *pendente lite*, defendant appealed to the supreme court. The opinion of that court was:

"The learned chancellor seems to have held that under no circumstances could evidence be heard against allowing alimony *pendente lite*. The general rule is, of course, that such alimony will be allowed, and the merits not inquired into. But it is equally well settled that where the answer denies there ever was a marriage, and that averment, clearly, from the showing made, appears to be true, no alimony *pendente lite* should be allowed; and this for the reason, as stated in *McFarland v. McFarland*, 64 Miss. 449, 1 So. 508, that marriage is the very foundation of the wife's right to support. It would be monstrous that the law should require the payment of alimony *pendente lite* to one who clearly never was a wife. Some *prima-facie* showing of marriage must be made when it is allowed. So are all the authorities. See 7 Am. & Eng. Ency. Law, 101, with notes." Correct reference, 2 Am. & Eng. Ency. Law (2 Ed.), p 101. The instant case is even stronger than the Reed case, in that complainant and defendant each knew that the other had a living spouse. *Holbrook v. Holbrook*, 32 La. 13; *Collins v. Collins*, 71 N. Y. 274. The action was for divorce and alimony.

The above decisions refer to alimony *pendente lite*. But if, as Judge WHITFIELD says in *Reed v. Reed*. "It would be monstrous that the law should require the payment of alimony *pendente lite* to one who clearly never was a wife," then it would be a monstrous monstrosity to require payment of permanent alimony to one who clearly never was a wife. That complainant never was a wife of defendant is shown conclusively by this record. A legal marriage is the very foundation of the obligation of the husband to support the wife. "So are all the authorities." *Reed v. Reed*, 85 Miss. 128; *McFarlane v. McFarlane*, 51 Iowa, 565.

If "moral turpitude" is to weigh in this case, and it is absurd to think it will, but the case will be decided on the law and evidence, then complainant is tared with the same stick that the defendant is, and she being complainant, asking for affirmative relief, has no standing in court.

*T. E. Mortimer and Geo. Butler, for appellee.*

It may be admitted that at common law, under the facts shown by this record, that the wife would not be entitled to alimony as alimony. The contention of the appellee in this regard is that the statute of Mississippi changed the common law on this subject and now authorizes alimony in all cases. That even at common law, independent of any statutory provision, the equity court had the power and frequently exercised the power to award the wife compensation even though the marriage was declared void.

"The matter of alimony is regulated by statute in many of the states, and by them is allowed, as a general rule, in favor of the wife in all cases of divorce. It is said, however that where the divorce is unqualified and absolute. The nature and principals of the provisions to be made for her rights are essentially and radically different."

"As a general rule, at common law, no alimony could be assigned to the wife from whom the husband had obtained a divorce for her fault or misconduct, as for adultery on her part."

"And in several states alimony is allowed only upon a divorce obtained for the adultery or other fault of the husband, and expressly prohibited when for the adultery of the wife. But independent of considerations of exact justice in order that the offender may not become an out-cast from society, and upon the further human and moral ground that the wife may not become tempted to continue

in a course of vice, it is provided by statute in many of the states that the husband must make provision for his erring wife upon divorce from her. And under statutes providing generally that when a divorce is decreed the court may make such an order as to the maintenance of the wife as may seem proper, it is held that the court may make provision for the guilty wife." 2 Am. & Eng. Enc. of Law, 110-119.

This same general doctrine is supported by the text in R. C. C. Alimony, sections 15-15-52-66-82-82-86.

The effect of section 1673, Code of 1906. Hemmingway's Code, section 1415, is to confer jurisdiction upon the chancery court to allow alimony in all cases where it "may seem equitable and just to do so." The history of this section shows this was the purpose. Our first enactment upon this subject is the act of June 1, 1822. This act was amended February 13, 1840. Hutchinson's Code, section 1495, *et seq.*

These acts as amended gave the chancery court jurisdiction of all causes of divorce by that act directed and allowed. Section 3 of the act as amended provides: "Divorce from the bonds of matrimony shall be decreed in case the parties are within the degrees prohibited by law; in case where either party is naturally impotent and in case of adultery in either of the parties, and also for wilful, continued and obstinate desertion for the term of three years."

Section 4 of that act provides: "Divorce from the bonds of matrimony shall also be decreed where either of the parties had another wife or husband living at the time of such second or other marriage."

Section 6 of the Act of 1822 authorized the court to grant a divorce from bed and board in cases of extreme cruelty. Sections 2 and 3 of the Act of February 13, 1840, made extreme cruelty a ground for divorce absolute.

Section 7 provided: "When a divorce shall be decreed on account of the parties being within the prohibited degrees of for the cause of adultery or extreme cruelty, the court shall and may in every case take such order touching the care and maintenance and alimony of the wife or any allowance to be made to her, and if any, the security to be given for the same, as from the circumstances of the parties and nature of the case may be fit, equitable and just."

It will be noted that under these acts, no alimony could be awarded if the bonds of matrimony were dissolved because either party was naturally impotent; for wilful, continued or obstinate desertion, or, if either party had another husband or wife living at the time of the second marriage.

The Code of 1857, pages 333-335, authorized divorce if the parties were within the degrees prohibited by law; for natural impotency or adultery; being sentenced to the penitentiary for not less than two years, and not pardoned before being sent there; for desertion for three years.

It was also provided that divorce from the bonds of matrimony may also be decreed if the husband have another wife living at the time of the second or subsequent marriage. Divorce from bed might be decreed for extreme cruelty or habitual drunkenness, and section 15 authorized a divorce where the other party was insane or an idiot at the time of the marriage, if the party applying did not know of the insanity.

Section 17 is as follows: "When a divorce shall be decreed either from the bonds of matrimony or from bed and board, the court may, in its discretion, make all orders touching the maintenance and alimony of the wife or any allowance to be made to her and may if need be, require securities for the same so allowed, having regard to the

circumstances of the parties, and the nature of the case, as may be equitable and just.”

The effect of the amendment contained in the Code of 1857 was to extend the right to alimony to all classes of divorce proceedings. That is, to divorce for natural impotency; for wilful, continued and obstinate desertion, and where a divorce was granted because of a prior undissolved marriage and to the new grounds of divorce for the first time appearing in the Code of 1857. The provisions of the Code of 1857, were continued in effect, substantially though with change of phraseology and arrangement in the Codes of 1871, 1880, 1892, and 1906.

These statutes gave power to the chancery court to award alimony in divorces *a mensa et thoro*, a power that the ecclesiastical courts did not possess at common law. It also gave the chancery court discretion to award alimony to the wife even though divorce was obtained from the wife because of her misconduct or adultery and changed the ecclesiastical and common law in this regard.

Our own court in speaking of this statute, quotes from *Coon v. Coon*, 26 Ind. 189 and *Hendrick v. Hendrick*, 28 Ind. 291, and points out the language of the Indiana statute and says that our statute is as broad in its scope; quotes with approval from *Groves v. Groves*, 108 Mass. 314, and points out that the English Parliament upon granting a divorce to a husband on the ground of adultery of his wife, requires him to make a provision for her out of his estate. *Jee v. Furlough*, 4 D. & R. 11. The court then pointed out the modification of the common law made by our statute and held that the court might, in proper cases, decree alimony to the wife where the husband is granted a divorce.

Justice SMITH in a concurring opinion in that case says: “The allowance of alimony in this state is governed by section 1673 which provides that it may be

allowed in all cases where it may seem equitable and just to do so." That is our exact contention in this case. *Brown v. Brown*, 18 Ill. App. 445; *Lee v. Lee*, 104 North Carolina, 603; *Vanvalley v. Vanvalley*, 19 Ohio St. 588; *Rickard v. Rickard*, 26 L. R. A. (N. S.) 500; *Stableburg v. Stableburg*, 77 Conn. 31; *Griffin v. Griffin*, 47 N. Y. 134; *Higgins v. Higgins*, 164 N. Y. 4; *Barbour v. Barbour*, 77 Iowa, 303; *Webb v. Waybe*, 44 Mich. 674; *Hunt v. Hunt*, 22 L. R. A. (N. S.) 1202; *Willits v. Willits*, 76 Neb. 228; *Werner v. Werner*, 41 L. R. A. 349; *Daniels v. Morris*, 54 Iowa 364; *Wilkinson v. Wilkinson*, 674 Lt. (N. S.) 62.

Under our statute it was a matter committed to the discretion of the trial court as to whether that court would or would not allow attorney's fees and alimony under the facts of this case. Certainly it cannot be said that the defendant stands in any favorable light in setting up his moral turpitude in defense of his wife's right to support. Neither reason nor justice would require that the consequences of that unlawful marriage be visited alone upon the wife. The position of the husband does not appeal very strongly to the enlightened conscience of this age.

While we think the statute in this case is absolutely controlling, it is perhaps well to bear in mind that at common law and independent of any statute, the chancery court would work out equities in cases of this kind.

It will be noted that the appellant alleged in her bill that the property accumulated was largely the result of her personal labor and undertook to show this fact at the trial of the case. The court took the view, however, that under the statutes of the state this fact was immaterial. Probably an erroneous view, because that fact might become an important question in determining the amount of the allowance to be made to the wife. However, the appellee is not in a position to complain of this error.

Independent of the statute, "both in England and the United States where the marriage was void as when the

husband had a former living wife, and the woman was of good character and blameless, and allowance had been decreed her," 1 Am. & Eng. Enc. of Law, 118; *Scrimshire v. Scrimshire*, 4 Eng. Enc. 562; *Strode v. Strode*, 5 Bush. (K.) 228; *Werner v. Werner*, 41 L. R. A. 349; Thelford on Marriage and Divorce, 17 Law Lib. (N. S.) 347, 587; *Jones v. Brimssmade*, 3 L. R. A. (N. S.) 194; *Webb v. Wayne*, 144 Mich. 647; *Johansen v. Johansen*, 128 N. S. (Supp.) 892; *Higgins v. Sharp*, 164 N. Y. 4. These same principles are announced in *Willits v. Willets*, 76 Neb. 228, 5 L. R. A. (N. S.) 767; *Hunt v. Hunt*, 22 L. R. A. (B. S.) 1202; *Barbour v. Barbour*, 77 Iowa, 303; *Wilkinson v. Wilkinson*, 74 Lt. (N. S.) 62; *Elliott v. Elliott*, 77 Wis. 634; *Avery v. Avery*, 22 Wash. 267; *Coats v. Coats*, 36 L. R. A. (N. S.) 844; *Mitchell v. Fish*, 36 L. R. A. 838.

It is insisted however, by counsel for appellants that the question under discussion is forever closed by *Reed v. Reed*, 85 Miss. 126, that by that decision this court is finally and irrevocally committed to the doctrine that there can be no alimony unless there was a lawful marriage.

It the learned judge, who wrote the opinion in that case meant to hold that alimony could not be allowed at a suit of the wife, when the husband admitted a *de facto* marriage, and plead that the *de facto* marriage was void because of the incompetency in one of the parties to enter into that relation, he fell into grievous error, and the learned judge is not supported by the text upon which he relies. The court was in error as to what was a *prima facie* showing, according to the very authority cited. "It is generally held that proof or admission of a *de facto* marriage presents a proper case for the allowance of alimony *pendente lite*, though a marriage *de jure* is denied. So in suits of divorce rendering the marriage null and void from the beginning, as where divorce is sought on the ground of another marriage, alimony



*pendente lite* may be allowed upon proof of marriage in fact."

The text is supported by a great number of authorities from England, Canada and the United States. There is no decision in Mississippi that is conclusive against us. To the contrary, under the principles announced in *Winkler v. Winkler, supra*, appellee should be entitled to her alimony and attorney's fees.

SMITH, C. J., delivered the opinion of the court.

This proceeding was instituted in the court below by appellee to obtain a divorce and alimony from her alleged husband, on the ground of cruel and inhuman treatment. Appellant in his answer to the bill denied the cruel and inhuman treatment, and further alleged that appellee was not his lawful wife, for the reason that at the time of her alleged marriage to him she had a living and undivorced husband and that he had a living and undivorced wife. The evidence disclosed the marriage of appellant and appellee and their cohabiting thereafter as husband and wife; that about seventeen years prior to her marriage to appellant, appellee married one Milton Streeter, and their cohabiting together for some time thereafter as husband and wife; that she had not been divorced from him; that some years prior to appellee's marriage with Streeter, he married Molly Brown, who is still living, and their cohabiting together some time thereafter as husband and wife. As to whether or not Streeter and Molly were afterwards divorced does not appear from the record, the evidence being wholly silent relative thereto. It further appears from the evidence that appellant, some years prior to his marriage with appellee, married one Laura Thompson, who is still living; that they cohabited together as man and wife for some time thereafter and have never been divorced, which fact was known to appellee at the time

she married appellant. There is also evidence tending to prove appellee's claim that appellant's treatment of her was cruel and inhuman. Appellee offered, but was not permitted by the court to prove, that she had aided appellant to accumulate what property he has. The court below granted appellee a divorce and by its final decree further ordered appellant to pay her the sum of one hundred and fifty dollars as a solicitor's fee, and twenty-five dollars per month thereafter, as alimony. After this appeal was taken, appellant died, and it was revived in the name of his administrator, so that the correctness of the decree appealed from, in so far as the granting of the divorce is concerned, is now merely incidental; the main question being whether or not the attorney's fee and alimony should have been allowed.

Appellee's marriage to Milton Streeter must be presumed to be valid, in the absence of evidence that Streeter had not been divorced from his former wife (*Railway Co. v. Beardsley*, 79 Miss. 417, 3 So. 660; *Knights of Pythias v. Tucker*, 92 Miss. 505, 46 So. 51; *Bennet v. State*, 100 Miss. 684, 56 So. 777), so that it necessarily follows, because she had not been divorced from Streeter, and also because appellant had not been divorced from Laura, that her marriage to appellant was void, and the foundation of her right to alimony, according to *Reed v. Reed*, 85 Miss. 126, 37 So. 642, that is, a marriage valid in its inception, does not exist.

We are not here called upon to determine whether or not this rule would apply in view of the provisions of section 1673, Code of 1906 (Hemingway's Code, section 1415), in event appellee had married appellant without knowledge of the facts that render the marriage void.

Even if it be true that appellee aided appellant in accumulating what property he has, that fact would not render the allowance of alimony to her "equitable and just," for under the facts here in evidence she not only

was not appellant's wife, but to all intents and purposes was simply his mistress.

The decree of the court below will be reversed in so far as it awards a solicitor's fee and alimony, and the bill to that extent will be dismissed.

*Reversed.*

---

STATE EX REL. COLLINS ATTORNEY GENERAL, v. CRESENT  
COTTON OIL Co.

[77 South, 185, 12 Banc.]

1. CORPORATIONS. *Foreign Corporations. Power of state.*

The state not only has the right to prohibit a corporation from entering it for the purpose of transacting business but also to expel such a corporation from the state after it has entered and commenced doing business therein, provided only that such corporation is not thereby deprived of a right guaranteed to it by the federal Constitution.

2. SAME.

The state also has the right, under section 178 of the state Constitution and within the limitations of section 14 thereof to withdraw from a domestic corporation powers granted to it when chartered, provided, also that such corporation is not thereby deprived of a right guaranteed to it by the federal Constitution.

3. SAME.

Laws 1914, chapter 162 (Hemmingway's Code, section 4750 et Sequitur), providing that a corporation engaged in the manufacture of cotton seed oil products shall not operate a cotton gin except where its cotton oil plant is located, and imposing a penalty, and in addition forfeiture of charter, if a domestic corporation, and if a foreign corporation, forfeiture of its rights to do business in the state for violation of the statute, is within the powers of the state.

4. CONSTITUTIONAL LAW. *Criterion.*

The criterion by which to test the constitutionality of a statute is not that those affected thereby may be inconvenienced.

APPEAL from the chancery court of Sunflower county.  
HON. E. N. THOMAS, Chancellor.

Proceedings by the state, on relation of Ross A. Collins, Attorney General, against the Crescent Cotton Oil Company. Relief denied and relator appeals.

The facts are fully stated in the opinion of the court.

*Geo. H. Ethridge*, assistant attorney-general, for the state.

Chapter 162, of the Laws of 1914, was enacted as an aid to the enforcement of the anti-trust laws of this state and for the purpose of cutting off some of the effective weapons for destroying competition.

The Law of 1914. is sustainable under either of two heads, both firmly grounded in the police power of the state. First, the power of the state to limit, restrict, regulate and confer power upon corporations. Second, the ginning business is a public business or a business affected with the public use.

It is fundamental and elementary law that corporations have no powers except such as are conferred by law; being wholly creatures of the statute, they can only exercise such powers as may be expressly conferred or such as are necessarily implied from those expressly conferred.

The rule as stated in *Clark on Corporations* (Horn Book Series) page 112, is as follows: "A corporation has such powers and such powers only, as are conferred upon it by its charter. Powers may be conferred upon a corporation. (A) expressly; (B) impliedly, because they are incidental to corporate existence. Impliedly, because they are necessary or proper in order to exercise the powers expressly conferred." *Downing v. Road Co.*, 40 N. H. 230; 1 Cumming Cas. Pri. Corp. 148; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Ryne v. Mfg. Co.*, 65 Conn. 336, 28 L. R. A. 304; *State v. Lincoln Trust Co.*,

144 Mo. 528; *Franklin Nat'l Bank v. Whitehead*, 149 Ind. 560, 39 L. R. A. 724, 67 Am. St. Rep. 303; *Best Brewing Co. v. Klassen*, 185 37, 57 N. E. 20; 50 L. R. A. 765; 76 Am. St. Rep. 26; *Bakers Union of the World v. Crawford*, 67 Kan. 449, 73 Pac. 79; 100 Am. St. Rep. 465; *Cumberland Tel. & Tel. Co. v. City of Evansville* (C. C.), 127 Ed. 187; *South Yorkshire Ry. Co. v. Great Northern Ry. Co.*, 9 Exch. 84.

A corporation being created by law primarily for the public welfare and having only such powers as may be expressly conferred on it or such as necessarily result as an implied incident to an express power, it follows that a corporation is not entitled to all the rights as a citizen. It is not a citizen of the state in the meaning that that term is used in the constitution guaranteeing the citizens of the state where it resides. *Ducat v. Chicago*, 10 Wall. (U. S.) 14, 19 L. Ed. 972; *Pembina, etc., Co. v. Penn.*, 125 U. S. 181, 31 L. Ed. 650; *Walters, etc., Oil Co. v. Texas*, 177 U. S. 45, 54 L. Ed. 657; *Silver etc., v. Walsh*, 226 U. S. 112, 57 L. Ed. 146.

Right to exclude or to impose conditions. A corporation created by one state or by a foreign government can exercise none of the functions or privileges conferred by its charter in any other state or country, except by the consent of the latter. Any other state or country than that of its creation may exclude it altogether if it sees fit, or it may impose such terms as it chooses as a condition of allowing it to do business." Clark on Corporations, page 604. Citing, *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357; *Liverpool Ins. Co. v. Oliver*, 10 Wall, 566, 19 L. Ed. 1029; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *New York L. E. & W. R. Co. v. Conn.*, 129 Pa. 463, 18 Atl. 312, 15 Am. St. Rep. 724; *Phoenix Ins. Co. v. Burdett*, 112 Ins. 204, 13 N. E. 705; *Goldsmith v. Insurance Co.*, 62 Ga. 379; *People v. Fire Assn.*

of *Philadelphia*, 92 N. Y. 331, 41 Am. St. Rep. 380; *Phoenix Ins. Co. v. Wench*, 29 Kan. 672; *State v. Phoenix Fire Ins. Co.*, 92 Tenn. 420, 21 S. W. 893; *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; *Orient Ins. Co. v. Daggs*, 19 S. Ct. 518, 44 L. Ed. 657; *Woodson v. State*, 69 Ark. 521, 65 S. W. 465; *Com v. Read Phostrate Co.*, 113 Ky. 32, 67 S. W. 45; *Attorney-General v. Electric Storage B. Co.*, 188 Mass. 239, 74 N. E. 467; *State v. Virginia-Carolina C. Co.*, 71 S. C. 544, 51 S. E. 455.

(Foreign corporations are permitted to do business in this state by virtue of sections 914 and 915 of the Code of 1906, the latter section being amended in the Laws of 1916, but it is provided in the concluding clause of section 914. "But such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy." *R. R. Co. v. Memphis*, 4 Cold. 406; *Anderson v. Turberville*, 6 Cold. 61; *Memphis v. Water Co.*, 5 Heis. 530.

As to power to regulate and control the business of corporations affected by public use. The leading case upon this subject is *Munn v. Illinois*, 94 U. S. 113, to 154, 24 L. Ed. 77 to 94; *Thorne v. R. R. Co.*, 27 Vt. 143. First, "every statute is presumed constitutional and will not be invalidated unless in a clear case," citing *Chicago etc., Ry. v. Dey*. 35 Fed. 866, 1 L. R. A. 744, and note; *Laurel Fork R. R. v. Transportation Co.*, 25 W. Va. 325, and *N. Swan v. United States*, 3 Wyo. 155, 9 Pac. 933; *Leep v. Railway Co.*, 85 Ark. 415, 41 Am. St. Rep. 113, 25 S. W. 77, 23 L. R. A. 268; *People v. Thompson*, 115 Ill. 465, 40 N. E. 310. Second, "while government may not interfere with exclusively private contracts, it may require each citizen to so conduct himself and use his property as not to injure others. This

is the very essence of government," citing *Smith v. Lake Shore, etc., Ry.*, 114 Mich. 489, 72 N. W. 338. Dissenting opinion in *Territory v. Ah Lim*, 1 Wash. 172, 24 Pac. 592, 9 L. R. A. 399. Majority upholding law penalizing opium smoking; *Smith v. Lake Shore, etc., Ry.*, 111 Mich. 489, 72 N. W. 338. Majority upholding law requiring sale of thousand-mile tickets at fixed rate. *Nash v. Page*, 80 Ky. 547, 44 Am. St. Rep. 495; *Budd v. N. Y.*, 143 U. S. 147, 36 L. Ed. 256; *Louisville Tobacco Co. v. Warehouse Co.*, 48 S. W. 432, 59 S. W. 1071; *Rushville v. Rushville Co.*, 132 Ind. 484, 15 L. R. A. 325; *Hackett v. State*, 105 Ind. 258, 55 Am. St. Rep. 206; *State v. Chicago, etc., R. R. Co.*, 38 Minn. 281, 37 N. W. 782; *State v. St. L.*, 145 Mo. 574, 42 L. R. A. 122, 25 Am. St. 889, and note. Note to 26 Am. St. Rep. 289 to 292; Note to *Nash v. Page*, 44 Am. St. 490; *Leep v. Ry. Co.*, 58 Ark. 416, 44 Am. St. 115, 23 L. R. A. 268; *Sinking Fund Cases*, 99 U. S. 747, 25 L. Ed. 511; *State v. Republican, etc., R. R. Co.*, 17 Neb. 647, 52 Am. St. 424; *Ruggles v. Illinois*, 108 U. S. 531, 27 L. Ed. 815; *Ryan v. Louisville Terminal Co.*, 102 Tenn. 119, 45 L. R. A. 307 (applying the principal to the Terminal Company), *Burlington v. Beasley*, 94 U. S. 314, 24 L. Ed. 164 (applying the principal to grist mills); *State v. Edwards*, 86 Me. 105, 41 Am. St. 530; *Civil Right Case*, 109 U. S. 42, 27 L. Ed. 850; *People v. King*, 110 N. Y. 428, 6 Am. St. Rep. 396, 1 L. R. A. 295; *Stock Exchange v. Board of Trade*, 127 Ill. 158, 11 Am. St. 107, 2 L. R. A. 413 (applying the principle to stock yards); *Spring Valley Water Co. v. Scholatter*, 110 U. S. 354, 28 L. Ed. 176; *Griffin v. Golasboro, etc., Co.*, 122 N. C. 207, 41 L. R. A. 241; *Danville v. Danville Water Co.*, 178 Ill. 300, 69 Am. St. 309; *White v. Canal Co.*, 22 Colo. 198, 31 L. R. A. 1; *Brass v. N. O.*, 153 U. S. 399, 38 L. Ed. 760; *Noble State Bank v. Haskell, et al.*, 219 U. S. 104, 55 L. Ed. 112.

It is established by a series of cases that an ulterior public advantage may justify a comparatively insignifi-

cant taking of private property for what, in its immediate purpose is a private use. *Clark v. Nash*, 198 U. S. 361, 49 L. Ed. 1085; 25 Sup. Ct. Rep. 676; 4 A. & E. Ann. Cas. 1171; *Stickley v. Highland Boy Gold Min. Mill. Co.*, 200 U. S. 527, 50 L. Ed. 581, 583, 26 Sup. Ct. Rep. 301, 4 A. & E. Cas. 1174; *Offeld v. New York, N. H. & H. R. Co.*, 203 U. S. 372, 51 L. Ed. 231, 27 Sup. Ct. Rep. 72; *Bacon v. Walker*, 204 U. S. 311, 51 L. Ed. 499, 501, 27 Sup. Ct. Rep. 289; *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. Ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 576.

It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 42 L. Ed. 260 17 Sup. Ct. Rep. 864; *Charlotte C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 35 L. Ed. 1051, 12 Sup. Ct. Rep. 255; *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. Ed. 725, 728, 20 Sup. Ct. Rep. 633. So far is that from being the case that the device is a familiar one. It was adopted by some states the better part of a century ago, and seems never to have been questioned until now. *Dandy Bank v. State Treasurer*, 39 Vt. 92; *People v. Walker*, 17 N. Y. 502; Recent cases going not less far are *Lemieux, v. Young*, 211 U. S. 489, 53 L. Ed., 295, 29 Sup. 174; *Kidd D. & P. Co. v. Musselman Gro. Co.*, 217 U. S. 461, 54 L. Ed. 839, 30 Sup. Ct. Rep. 606; *State ex rel. Goodsill v. Woodmansee*, 1 N. D. 246, 11 L. R. A. 420, 46 N. W. 970; *Brady v. Mattern*, 125 Iowa, 159, 106 Am. St. Rep. 219, 100 N. W. 358; *Weed v. Bergh*, 141 Wis. 169, 25 L. R. A. (N. S.) 1217, 124 N. W. 664; *Com. v. Vrooman*, 164 Pa. 306, 25 L. R. A. 250, 44 Am. St. Rep. 603, 30 Atl. 217; *Myers v. Irwin*, 2 Serg. & R. 368; *Myers v. Manhattan Bank*, 10 Ohio 283; *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 377; *Shallenberger v. First State Bank*, 219 U. S. 114, 55 L. Ed. 117; *Fund Cases* 99 U. S. 718, 25 L. Ed. 501; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253, 8 Sup. Ct. Rep. 882, 1257; *Gundling v. Chicago*, 177 U. S. 183, 44 L. Ed. 725, 20 Sup. Ct. Rep. 633; *Barbier v. Conolly*, 113 U. S. 27, 28 L. Ed. 923, 5 Sup.



Ct. Rep. 357; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346; 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500; *Marbury v. Madison*, 1 Cranch. 137, 2 L. Ed. 60; *State v. Namias*, 49 La. Ann. 618, 62 Am. St. Rep. 657, 21 So. 852; *State v. Vanderslins*, 42 Minn. 129, 6 L. R. A. 119, 43 N. W. 789; *Logan v. Postal Teleg. & Cable Co.*, 157 Fed. 570; *Otis v. Parker*, 187 U. S. 606, 47 L. Ed. 323, Sup. Ct. Rep. 168; *Offeld v. New York, N. H. & H. R. Co.*, 203 U. S. 357, 51 L. Ed. 235, 27 Sup. Ct. Rep. 72; *Missouri P. R. Co. v. Himes*, 115 U. S. 514, 29 L. Ed. 463, 6 Sup. Ct. Rep. 110; *Chicago B. Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. Ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *Assasria State Bank v. Dolley*, 219 U. S. 121, 55 L. Ed. 123; *Ingle v. O'Malley*, 219 U. S. 128, 55 L. Ed. 128; *State v. Richcreek*, 5 L. R. A. (N. S.) 876; *Heddrich v. State*, 101 Ind. 564, 51 Am. Rep. 768, 1 N. E. 47; *Jamieson v. Indiana Natural Gas & Oil Co.*, 129 Ind. 555, 12 L. R. A. 652; 3 Inters. Com. Reo. 613, 28 N. E. 76; *State ex rel. Smith v. McClellant*, 138 Ind. 395, 37 U. S. 799; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Lake Shore & Mich., etc. Ry. Co. v. Ohio*, 173 U. S. 285, 43 L. Ed. 702; *Atl. Coast Line R. R. Co. v. N. C.*, 206 U. S. 1, 51 L. Ed. 833, 11 A. & Eng. Ann. Cas. 398; *City of Gainesville v. Gainesville Gas & Electric Power Co.*, 62 So. 919; *State ex rel. Ellis v. Tampa Water Works Co.*, 57 Fla. 533, 539, 48 So. 639, 22 L. R. A. (N. S.) 680; *Wyman Pub. Service Corporation*, sec. 113; *Gas Light Co. v. Zanesville*, 47 Ohio St. 35, 23 N. E. 60; *State ex rel v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 44 So. 213, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359; *People ex rel. Stead v. Chicago, etc., R. Co.*, 223 Ill. 518, 7 Ann. Cas. 1; *Kavanaugh Co. v. So. Ry. Co.*, 1 Ann. Cas. 705; *People ex rel. Cantrell v. St. Louis, etc., R. Co.*, 35 L. R. A. 224, 38 N. E. 562; *Ex parte Attorney-General* 17 N. B. 667; *State ex rel v. Missouri, etc., R. Co.*, 55,

Kan. 709, 29 L. R. A. 444, 49 Am. St. Rep. 278, 41 Pac. 964; *Ohio & M. R. Co. v. People*, 110 Ill. 200, 11 N. E. 347; *Farmer's Loan & Trust Co. v. Henning*, Federal Case No. 466; *King v. Severn, etc, R. Co.*, 2 Barn and Ald. 646; *People v. Albany etc, R. Co.*, 16 How. Pr. 523, 11 Abbott. Pr. 136; *People v. Albany & U. R. Co.*, 24 N. Y. 261, 82 Am. Dec. 295; *Loraine v. Pittsburg, etc., R. Co.*, 205 Pa. 132, 61 L. R. A. 502, 54 Atl. 580; *R. R. Com. v. Portland, etc., Co.*, 63 Me. 269, 18 Am. Rep. 208; *State v. Mo. Pac. R. Co.*, 33 Kan. 176, 5 Pac. 772; *Pensacola & A. R. Co. v. State*. 24 Fla. 310, 3 L. R. A. 661, 2 Int. Com. Rep. 522, 5 So. 833, 839; *U. S. v. Trans Mo. Freight Assn.*, 166 U. S. 290, 41 L. Ed. 1007-1024; *N. C. Corp. Com. v. Atl. Coast Line R. Co.*, 137 N. C. 1, 115. Am. St. Rep. 636, 49 S. E. 191; *San Antonio St. Ry. Co. v. State*, 90 Tex. 520, 523, 35 L. R. A. 662, 59 Am. St. Rep. 834, 39 S. W. 926; *Branch v. Wilmington, etc., R. Co.*, 77 N. C. 347; *Talcott v. Pine Grove Township*, 1 Flipp. 144, Fed. Cas. No. 13735.

I submit the act in question is within the limits of the police power of the state and that the facts in evidence, which are not disputed by any other testimony make it clear that the judgment of the court below should be reversed and the case remanded for further proceedings.

*J. B. Harris and A. W. Shands*, for appellee.

The only question which is properly before this court, in our view, is the clear cut question of the constitutionality of the Act of 1914, above referred to. We gather from the brief for the state that because the appellee is a foreign corporation, the state has a right to apply the act to it and to expel it, although the act might be inapplicable to domestic corporations and to individuals. We insist that under the facts of this case the state has no right to discriminate against a foreign corporation, as such, and simply because it is a foreign corporation. and we have

found no case whatever supporting any such view. In the case of the *State v. Louisville & Nashville Railroad Co.*, 97 Miss. 35, at page 53, this court says: "Our attention is called to the case of *Southern R. R. Co. v. Greene*, 30 Sup. Ct. 287, 216 U. S. 300, 54 Law Ed. 336, at pages 451, 452. The question and the only question decided in that case, was stated in the opinion as follows: 'When a corporation of another state has come into the taxing state, in compliance with its laws, and has therein acquired property of a fixed and permanent nature, upon which it has paid all taxes levied by the state, it is liable to a new and additional franchise tax for the privilege of doing business within the state, which tax is not imposed upon domestic corporations doing business in the state of the same character as that in which the foreign corporation is itself engaged. The court, following the cases of *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 Law Ed. 666; *Cotting v. Kansas Stock Yards Co.*, 183 U. S. 79, 46 Law Ed. 92; *Connolly v. Union Sewer & Pipe Co.*, 184 U. S. 540, 46 Law Ed. 679, held that where a railroad company had lawfully come into the state, and with its sanction established a business of a permanent character requiring for its prosecution a large amount of fixed and permanent property, it is a person within the jurisdiction of the state, and as such is entitled, under the equal protection of the law clause of the fourteenth amendment to the United States Constitution, to protection against the imposition of privilege taxes for carrying on business within the state where no such tax is imposed upon domestic corporations carrying on a precisely similar business.'

The court undertook, we think, unsuccessfully, to distinguish the case in hand from the case of *Herndon v. Chicago & Rock Island R. R. Co.*, 218 U. S. 135, and the case of the *Western Union Tel. Co. v. Kansas*, 216 U. S. 1; but finally the question was set at rest in the case of *Harrison v. St. Louis & Santa Fe R. R. Co.*, 232 U. S. 318, 58 Law

Ed. 621, which rendered the Mississippi act unconstitutional. *Security Mutual Life Insurance Co. v. Prewitt*, 202 U. S. 246, 50 Law Ed. 1013; *Southern R. R. Co. v. Greene*, *supra*, 216 U. S.—, 54 Law Ed. at page 539; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 Law Ed. 666; *Cotton v. Kansas City Stock Yards Co.*, 183 U. S. 79, 46 Law Ed. 92; *Connerly v. Union Sewer Pipe Co.*, 148 U. S. 540, 46 Law Ed. 679; *American Smelting & R. R. Co. v. Lindsey*, 204 U. S. 104, 51 Law Ed. 393, at page 397; *Herndon v. Chicago, R. I & P. R. R. Co.*, 218 U. S. 155, 54 Law Ed. 970; *State v. L. & N. R. R. Co.*; *National Cotton Oil Co. v. Texas*, 197 U. S. 130, 49 Law Ed. 689; *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 53 Law Ed. 530.

It will be seen, therefore, that foreign corporations entering the state of Mississippi may perform any act authorized by its charter which does not conflict with the public policy or laws of the state. There is nothing whatever that distinguishes them in this respect from domestic corporations. There is nothing whatever in the law which authorizes the burdening of them in any way that a domestic corporation may not be burdened, also.

Counsel for the state undertakes to defend and uphold this act under what he terms the police power of the state. On page 9 of the brief, he says: "The Law of 1914, is sustainable under either of two heads, both firmly grounded under the police power of the state. First, the power of the state to limit, restrict, regulate and confer power upon corporations; and, second, the ginning business is a public business or a business affected with the public use."

It is not denied by us and could not be denied that the state has the power to limit, restrict, regulate and confer power upon corporations, nor could we at this late day under the well settled principles, deny, nor do we under-

take to deny that the state has a right to regulate any business affected with the public interest.

In the first place, it is well settled that corporations are persons within the provisions of the fourteenth amendment to the Constitution of the United States, and as such they cannot be denied the equal protection of the law nor can their property be taken without due process of law. A corporation is entitled to the same protection as a natural person. We might stop by citing the court to the case of *Ballard v. Oil Co.*, 81 Miss. 507; *Gulf, C. & S. F. R. R. Co. v. Ellis*, 165 U. S. 150, 41 Law Ed. 668; *Santa Clara County v. S. P. R. R. Co.*, 118 U. S. 394 30 Law Ed. 118; *Pembina Consolidated Silver Mining Co. v. Pennsylvania*, 125 U. S. 181, 189, 31 Law Ed. 650, 654; *Mo. Pac. R. R. Co. v. Mackie*, 127 U. S. 205, 32 Law Ed. 107; *Minneapolis & St. L. R. R. Co. v. Beckwith*, 129 U. S. 26, 32 Law Ed. 585; *Charlotte C. & A. R. Co. v. Bibbs*, 142 U. S. 386, 35 Law Ed. 1051; *Covington & L. Turnpike Co. v. Sanford*, 164 U. S. 578, 41 Law Ed. 560; *Pembina Consolidated Silver Mining Co. v. Pennsylvania*, 125 U. S. 189, 31 Law Ed. 653.

Nothing is better settled than that the power to regulate corporations does not carry with it the power to destroy, or to take from the corporation its property without due process of law, or to deny to the corporation the equal protection of the laws. *Smyth v. Ames*, 169 U. S. 466; *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362; *Railroad Commission Cases*, 116 U. S. 307; *C. M. & S. v. P. R. R. v. Minn.* 134 U. S. 418, 40 Cyc., page 149; *Powell v. Penn.* 134 U. S. 678, 32 Law Ed. 253. This case is cited in *Hopper v. Cal.* 155 U. S. 662, 39 Law Ed. 303; *Allgeyer v. Louisiana*, 165 U. S. 590, 41 Law Ed. 836; *Helena v. Dwyer*, 64 Ark. 426. "The police power must not be exercised arbitrarily. It must be so exercised as not to deny to any persons the equal protection of the law." *Vick Wo. v. Hopkins*, 118 U. S. 356, 30 Law Ed. 220 So far from not depriving corporations interested in the

manufacture of cotton seed oil and its by-products of their property, the act virtually confiscated it.

Nothing is better settled than that a state may in the proper exercise of its police power, classify persons and corporations and impose burdens or restrictions upon one class that is not imposed upon another, but the power of classifications is limited, and that it is limited is fully recognized in this state in the *Ballard Case*, *supra*.

Neither the police power nor the reserved power to alter and amend a charter can justify a classification which is violative of constitutional principles. One of the leading cases of the supreme court of the United States on the subject of classification is the case of *Gulf, C & F. R. R. Co. v. Ellis*, 165 U. S. 150, 41 Law Ed. 668; *Stratton v. Morris*, 89 Tenn. 497; *Southern R. R. Co. v. Greene*, 216 U. S. 400, 54 Law Ed. 541; *Cotton v. Godard*, 183 U. S. 97, 46 Law Ed. 107; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 Law Ed. 690.

The *Ballard* case we think is decisive of this case. It is clearly and distinctly held there that an act discriminating between corporations and individuals engaged in the same business is unconstitutional and violative of the fourteenth Amendment of the Constitution of the United States. The court further held in the *Ballard* case at pages 569, 570 and 581, that statutes making classifications may be upheld if they are based in this classification upon any substantial difference between the natures of the business of the favored class, corporation or individual.

The only ground upon which this legislation can be upheld is that the ownership or control of gins by cotton seed oil mills is inimical to the public interest and that the ownership by individuals or other corporations is not. In either case they are equally potentially injurious.

We therefore conclude that neither under the police power of the state, nor under its reserved power to alter, amend or repeal charters, nor under its general power to regulate corporations can this legislation be sustained. It

is in plain violation of the principles well established not only by the supreme court of the United States in the numerous cases which we have referred to, but by the elaborate and well considered decision of our own court in the case of *Ballard v. Oil Mill*, 81 Miss. 507. The principle laid down in the Ballard case has never been departed from by the supreme court of the United States.

The tendency has been to strengthen it.

SMITH, C. J., delivered the opinion of the court.

The Crescent Cotton Oil Company is a corporation created under the laws of the state of Tennessee and domiciled in the city of Memphis, where it is engaged in the manufacture of cotton seed oil and meal, and owns and operates public cotton gins at Ruleville and other places in the state of Mississippi. Chapter 162, Laws 1914 (Hemingway's Code, section 4750. *et seq.*), provides that a corporation engaged in the manufacture of cotton seed products shall not own, lease or operate a cotton gin in this state except "in the city or town of the location of its cotton oil plant," and that a corporation which shall own, lease, or operate a cotton gin in violation of the statute shall be subject to a penalty of not less than one hundred dollars, nor more than five thousand dollars, and in addition thereto "shall forfeit its charter if a domestic corporation, and its right to do business in this state if a foreign corporation." The statute further provides that "a concern prohibited by this act from owning or operating gins is at liberty to dispose of said gins for cash or credit within a reasonable time after the passage of this act and to operate such gins until sold within such time."

This proceeding was instituted by appellant for the purpose of recovering from appellee the penalty prescribed for the violation of the statute, and of revoking its right to do business in this state.

The only question presented to us by the record is the validity *vel non* of the statute, the decision of which will turn upon the right of the state to expel a foreign corporation which it has permitted to enter the state and which is doing business therein pursuant to such permission, and to withdraw from a domestic corporation the right to engage in a business authorized by its charter. A state not only has the right to prohibit a corporation from entering it for the purpose of transacting business, but also to expel such a corporation from the state after it has entered and commenced doing business therein, provided only that such corporation is not thereby deprived of a right guaranteed to it by the federal Constitution. 6 Enc. U. S. Reps. 310; *National Council U. A. M. v. State Council*, 203 U. S. 151, 27 Sup. Ct. 46, 51 L. Ed. 132; *Railroad Co. v. State*, 107 Miss. 597, 65 So. 881. The state also has the right, under section 178 of the state Constitution and within the limitations of section 14 thereof, to withdraw from a domestic corporation powers granted to it when chartered, provided, also, that such a corporation is not thereby deprived of a right guaranteed to it by the federal Constitution.

That the state has the right, within the limitations pointed out, to expel a foreign corporation and to withdraw from a domestic corporation power granted it is not questioned by counsel for appellee; their contention being that the statute deprives corporations of the equal protection of the laws guaranteed to them by the federal Constitution, and of their property without due process of law in violation of both the state and federal Constitutions. There can be no merit in either of these two contentions, for the reason: First, that the state has the right to expel a foreign and to amend the charter of a domestic corporation by a special statute aimed only at the particular corporation (*National Council U. A. M. v. State Council*, 203 U. S. 163, 27 Sup. Ct. 46, 51 L. Ed. 138), while here all corporations of the class to which appellee belongs are treat-



ed alike; and, second, corporations engaged in operating cotton gins when the statute was enacted are permitted to continue so to do until they have had a reasonable time within which to dispose of them. That they may be subjected to inconvenience and hardships is not here material; such not being the criterion by which to test the constitutionality of a statute. *State v. Railroad Co.*, 97 Miss. 35, 53 So. 454, Ann. Cas. 1912C, 1150; *United States v. Delaware Railroad Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836; *Delaware, etc., R. Co. v. United States*, 231 U. S. 363, 34 Sup. Ct. 65, 58 L. Ed. 269.

It follows from the foregoing view that the relief prayed for by appellant should have been granted.

*Reversed and remanded.*

---

WOODS v. STURGES ET AL.

[77 South, 186, Division A.]

**RIGHTS. Promissory notes. Gifts inter vivos. Validity.**

Where a testator executed a demand note which was intended to evidence a mere gratuity, and delivered it to the payee, but such note was not in fact intended to be paid and was not paid before the maker's death, such a note cannot be upheld as a gift *inter vivos*.

APPEAL from the chancery court of Lauderdale county.

HON. G. C. TANN, Chancellor.

Bill by R. W. Sturges and another, executor of the estate of Theodore Sturges, deceased, against H. J. Woods, to cancel a promissory note. From a decree for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*F. V. Braham*, for appellant.

Notes, the payment of which are contingent on the termination of a life, have been held to import a consideration, where this was questioned. Cases involving this class are here included as having weight in determining the negotiability of such notes, although it was not discussed. One feature of negotiability is that the paper imports a consideration. *Safford v. Graves*, 56 Ill. App. 499; *Shaw v. Camp*, 61 Ill. App. 62, 160 Ill. 425, 43 N. E. 608; *Hathway v. Roll*, 81 Ind. 567; *In re Simmons*, 48 Misc. 484, 96 N. Y. Supp. 1103; *Root v. Strong*, 77 Hun. 14, 28 N. Y. Supp. 273; *Giddings v. Giddings*, 51 Vt. 233, 31 Am. Rep. 682; *Yarwood v. Trusts & Guarantee Co.*, 94 App. Div. 47, 87 N. Y. Supp. 947; *Banker v. Coons*, 40 App. Div. 573, 58 N. Y. Supp. 47.

It may be of interest to group other cases, where similar notes were held valid, but which do not pass on the question of negotiability of the instrument, because this was not raised in the issue in the cases. *Carrigus v. Home Frontier & Foreign Missionary Soc.*, 3 Ind. App. 91, 50 Am. St. Rep. 262, 28 N. E. 1009; *Putnam v. Lincoln Safe Deposit Co.*, 191 N. Y. 166, 83 N. E. 789; *Carnwright v. Gray*, 127 N. Y. 99, 12 L. R. A. 845, 24 Am. St. Rep. 425, 27 N. E. 835; *Wolfe v. Wilsey*, 2 Ind. App. 549, 28 N. E. 1004; *Maze v. Baird*, 89 Mo. App. 352; *Murray v. Cazier*, 23 Ind. App. 600, 53 N. E. 476, 55 N. E. 880; *R. E. Todd*, 47 Misc. 35, 95 N. Y. Supp. 211, a note; *Barnett v. Franklin College*, 10 Ind. App. 103, 37 N. E. 427; *Robinson v. Foust*, 11 Ind. App. 189, 99 St. Rep. 269, 68 N. E. 182; *Huguley v. Lanier*, 86 Ga. 640, 22 Am. St. Rep. 487, 12 S. E. 922; *Randall v. Grant*, 59 App. Div. 485, 69 N. Y. Supp. 221; *Carter v. King*, 11 Rich. L. 131; *Hamilton v. Hamilton*, 127, App. Div. 871, 112 N. Y. Supp. 10; *Alexander v. Follet*, 5 N. H. 499.

*S. R. Bourdeaux* and *A. S. Bozeman*, for appellee.

The appellant in this case is not a legatee because he is not mentioned in the will. He is not a creditor because he admits that the deceased owed him nothing. He does not pretend to be anything but a donee of the deceased. His pretended gift was not of any specific property, but merely an executory promise to give. The last will and testament as executed is effective and since the death of Mr. Sturges, is irrevocable. As long as this will stands unimpeached, it effectively disposes of Mr. Sturges' property and we repeat that the appellant is not named therein.

With all the respect to learned and eminent counsel on the other side, we submit that the one and only question involved in this case is whether or not the promissory note of a donor is the subject of a gift that can be enforced by the donee against the donor, or against his estate after his death, and we further confidently submit that this one and only question has been settled beyond all peradventure or doubt. See 3 R. C. L., page 937, sec. 133, and numerous authorities therein cited; see 20 Cyc. 1211 and 1240, and numerous cases therein cited; see 14 American and English Encyclopedia of Law (2 Ed.), pages 1030 and 1063 and numerous cases therein cited; see *Sullivan v. Sullivan*, 92 S. W. 966, 7 L. R. A. (N. S.) 156 and copious note thereunder.

There are so many cases cited to this point that we will not further burden this brief by citing them. Every set of selected cases has so called leading cases to this point with copious notes. The case above cited, *Sullivan v. Sullivan*, is one of the cases. We respectfully and confidently submit that a close scrutiny and careful analysis of all the reported cases on this point shows that there is no modern authority which takes the contrary view.

Construing this record and all reasonable inferences therefrom in its most favorable aspect for the appellant, the most that can be said for him is that Mr. Sturges promised to make him a gift of five thousand dollars in so

far as the obligation of the promise is concerned, this note was no more obligatory than a mere oral promise by Sturges. Sturges did not make a voluntary conveyance to Woods of certain lands. Sturges did not transfer to Woods stock or bonds. Sturges did not deliver to Woods any money. Sturges did not give or deliver to Woods any property of any kind whatsoever. To constitute a gift there must necessarily be a subject of the gift. Woods has absolutely no claim to any specific property in the hands of the executors. He does not say that Mr. Sturges has given anything, but merely that he promised to give him something.

Under the solemnities of the law, by last will and testament, Sturges actually and effectively gave all the property that he died seized and possessed of to persons other than Woods. The gifts by Sturges to the devisees under the will are executed and irrevocable. Executed gifts take precedence over executory promises to give. As long as the integrity of the last will and testament is not impeached, the right, title and interest of the devisees thereunder in and to the property that Sturges died seized and possessed of cannot be defeated, or in any wise affected, except by the just claims of creditors. To enforce Sturges' alleged executory promises to Woods would necessarily, to that extent, nullify the will and thwart the executed intentions of Sturges, expressed in a way sanctioned by law.

STEVENS, J., delivered the opinion of the court.

This appeal presents for decision the validity of a promissory note in the sum of five thousand dollars, executed by one Theodore Sturges in his lifetime, payable to appellant, H. J. Woods, upon demand. Appellant married the daughter of Theodore Sturges, but the daughter predeceased her father, who, in disposing of his estate, left

a valid last will and testament which has been duly probated, and by which he devises and bequeaths his entire estate to his three living children and two grandchildren. His son, R. W. Sturges, and R. M. Bourdeaux, appellees herein, were appointed executors. The executors duly qualified, and as such instituted this suit in the chancery court of Lauderdale county, praying the cancellation and delivery up of the promissory note held by Mr. Woods. The bill charges that the note was executed without consideration, and evidences an unexecuted gift for five thousand dollars. Conceding for the purpose of this statement the competency of Mr. Woods as a witness, it appears from the testimony taken before the chancellor that the testator, Theodore Sturges, many years ago stated to Mr. Woods that he (Sturges) desired to make Woods a gift, but in doing so he preferred not to mention or provide for the gift in his will, and requested Mr. Woods to consult an attorney to determine whether the gift could be made in the form of a promissory note. It appears from Mr. Woods' testimony that he then accepted the note as a gift. The original note was executed about 1909, and in 1915 the testator executed and delivered a renewal note payable upon demand. The renewal note was executed in January, 1915, and in December following Sturges duly executed his will. The will makes no mention of the Woods note or of any gift to Woods. After notice was published to creditors to probate claims, Woods filed his note with the chancery clerk and had the same registered and allowed. There is proof tending to show that after the death of the testator Mr. Woods admitted that his note was without consideration and invalid, and that he promised not to probate it. After its probate the executors exhibited a bill in this case to enjoin appellant from assigning or pledging the note to a third party and to cancel the same. There is a controversy be-

tween the parties as to the competency of appellant as a witness, but the law point determinative of this case renders unnecessary a discussion of any question save the one considered below. The chancellor decreed in favor of the complainants in the court below and disallowed appellant's claim.

The most that could be said for appellant's case is that Mr. Sturges, the testator, executed a demand note; that this demand note was intended to evidence a mere gratuity; that the note was duly delivered by the maker to the payee, but was not in fact intended to be paid, and was not paid, before the maker's death. Can the note, therefore, be upheld as a gift *inter vivos*? The authorities answer this question in the negative. In the case note to *Sullivan v. Sullivan*, 122 Ky. 707, 92 S. W. 966, 7 L. R. A. (N. S.) 156, 13' Ann. Cas. 163, it is stated:

"The weight of authority at the present time has established as a general rule of law that one cannot make his own promissory note the subject of a gift to such extent that it can be enforced by the donee against the donor in the latter's lifetime, or against his estate after his death."

This was the conclusion reached by the Kentucky court in the *Sullivan Case*, there reported, and this conclusion is supported by numerous authorities cited in the footnote. One of the leading cases is *Parish v. Stone*, 14 Pick. (Mass.) 198, 25 Am. Dec. 378, where the court, by SHAW, C. J., very pointedly and accurately says:

"It was simply a promise to pay money, and as such, and as a gift of a sum of money, it wants the essential requisite of an actual delivery."

There is a subsequent case note on checks and promissory notes as a subject of gift in 27 L. R. A. (N. S.) 308, and in this note the maker's own check is placed

in the same category as a promissory note. The authorities are abundantly collated in this note, and are against the contention of appellant in the present case. Counsel have not brought to our attention any decision of our own court where an alleged gift in the form of the maker's own note has been considered. But the spirit and trend of our decisions point to the general rule, and place this court within the spirit of the case just referred to. In *Meyer v. Meyer*, 106 Miss. 638, 64 So. 420, the general rule that a gift must be completed by actual delivery was announced, and it was expressly held that profits from business credited upon the books to the sons of one of the partners, but not actually paid over before death, could not be claimed as a gift; there being no delivery of the profits. It was there stated that:

The entry of the credit upon the books kept in the business "constitutes, at most, nothing more than a written evidence of the promise; and the written promise or declaration of an intention to give is no more valid or binding than a verbal one. It is simply easier to prove."

That is the case here. The note relied upon is a written promise by the maker to pay appellant five thousand dollars. The promise was never executed, and indeed was not intended to be complied with, until after the maker's death, although the maturity of the note was on the face thereof stated to be "on demand." The same reasoning is employed in *Kingsbury v. Gastrell's Estate*, 110 Miss. 96, 69 So. 661, where the court uses this expression:

"The gift was never consummated by delivery of the notes and the cancellation of the indebtedness."

See, also, 3 R. C. L. p. 937, section 133, and authorities cited; 14 Am. & Eng. Enc. of Law (2 Ed.), 1030 and 1063.

The cases relied upon by appellant presented instances where there was a voluntary conveyance of land or other property by the deceased in his lifetime, absolute conveyances, and delivery of property. In the case at the bar Mr. Woods lays no claim to any specific property conveyed to him, and he is in no wise named in the will as one of the beneficiaries. To enforce now the unexecuted promise of the testator to pay appellant a sum of money would necessarily reduce the estate and take from the devisees that which by solemn will has been expressly devised them.

There is no merit in any of the assignments of error, and the decree complained of is affirmed.

*Affirmed.*

---

BASS v. BOERIES ET AL.

[77 South, 189, Division B.]

1. MORTGAGES. *Pleading. Innocent purchasers.*

In a suit to foreclose a trust deed securing a note, a demurrer was properly overruled to a cross-bill charging that complainant was not a purchaser for value and that he did not take the assignment of the note and deed of trust for the purpose of vesting any title or interest in him to either.

2. JUDGMENTS. *Trust deeds. Cancellation. Interest affected.*

Where in a suit by the assignee to foreclose a trust deed securing a note, the maker by cross-bill sought a cancellation of the note, the interest of the original payee who was not a party to the suit, could not be affected.

3. BILLS AND NOTES. *Right of parties.*

If the original payee of a note released the maker in consideration of a deed to the payee's wife and this was known to the assignee of the note who was a mere volunteer, then the maker was entitled to a cancellation of the note and trust deed.



APPEAL from the chancery court of Harrison county.  
HON. W. M. DENNY, Jr., Chancellor.

Bill by Frank P. Bass against Felix Boeries and another. From a decree overruling a demurrer to answer and cross-bill, plaintiff appeals.

- The facts are fully stated in the opinion of the court.

*Rushing & Guice*, for appellant.

*Mize & Mize*, for appellee.

Cook, P. J., delivered the opinion of the court.

The appellant, complainant in a bill of complaint exhibited by him in the chancery court of Harrison county, appeals from a decree overruling his demurrer to the answer and cross-bill of the respondents, Lena Bass and Felix Boeries.

The original bill of complaint alleges that respondent and cross-complainant, Felix Boeries, being indebted to one Vincent Bass in the sum of five hundred and fifty dollars on the 20th day of January, 1913, executed and delivered his promissory note for said sum, payable to said Vincent Bass, or order, one year after date, together with interest and attorney's fees stipulated in the note; that to secure the payment of said note the said Felix Boeries executed a deed of trust upon certain described real estate situated in Harrison county, in which deed of trust complainant was made trustee. The original bill of complaint further charges that on the 13th day of December, 1913, the payee of the note and beneficiary in the deed of trust, for a good and valuable consideration, transferred and assigned to complainant the promissory note and the trust deed securing the same. The bill of complaint then prays for the appointment of a master to compute the amount due on said note according to its terms, and for a fore-

closure of the deed of trust by a commissioner, unless the same be paid in some short time fixed by the decree of the court.

The defendants, Lena Bass and Felix Boeries, answered the bill of complaint, and asked that their answer be taken as a cross-bill. Defendants and cross-complainants admit the execution and delivery of the note and deed of trust to Vincent Bass, but deny that same had been assigned to complainant for a good and valuable consideration; they admit that the note and deed of trust was assigned to Frank P. Bass by Vincent Bass, but allege that no consideration was given by Frank P. Bass to Vincent Bass for said assignment; they allege that the assignment of the note and deed of trust was for the purpose of avoiding some little trouble with which Vincent Bass was threatened at that time, and that assignment was only in trust and was so understood by the assignor and assignee; that both Vincent Bass and Frank Bass understood that the note and deed of trust was not assigned for collection or to give title to same to the assignee, Frank Bass.

We here quote in full from the answer and cross-bill, viz:

“Respondents further allege that thereafter, on, to wit, the 6th day of March 1914, the said Felix Boeries executed to Lena Camors Bass, wife of said Vincent Bass, and one of respondents herein, a deed to the property hereinabove described, with the right of redemption to said Felix Boeries, which said deed is of record in Book 16, p. 133, of records of deeds of trust and mortgages on land in the office of the chancery clerk of Harrison county, Miss., in consideration of which deed or mortgage last above referred to from Felix Boeries to Lena Camors Bass the said Vincent Bass released said Felix Boeries from the payment of said note of five hundred and fifty dollars of date January 20,

1913, and the deed of trust of date of January 20, 1913, securing said note, on which said note and deed of trust of date January 20, 1913, said Frank P. Bass is suing herein; and that said deed to the above-described property to Lena Camors Bass by Felix Boeries was given as aforesaid to said Vincent Bass in payment of said note and in cancellation of said deed of trust securing said note, of date January 20, 1913, and that in truth and in fact the said note of five hundred and fifty dollars of date January 20, 1913, and deed of trust of that date securing same, has been fully paid by the giving of said deed to Lena Camors Bass by said Felix Boeries of date March 6, 1914, to the above-described property, a copy of which said deed of March 6, 1914, to Lena Camors Bass by Felix Boeries to said above-described property is herewith filed marked Exhibit A hereto; and that said note and deed of trust of Felix Boeries to Vincent Bass of date January 20, 1913, is null and void, and has been paid as aforesaid and should be canceled; and that in law and in equity said note of date January 20, 1913, and deed of trust of said date from said Felix Boeries to Vincent Bass, Frank Bass, trustee, and the record of same, in the office of the clerk of the chancery court of said county, should be marked canceled."

Appellant demurred to the cross-bill, assigning the following grounds therefor:

"(1) Said cross-bill does not seek equitable relief.

"(2) Said cross-bill shows that at the time the mortgage was executed by Boeries to Lena Camors Bass, it was made to secure an indebtedness to Vincent Bass, and said bill admits that Vincent Bass had assigned his interest in the deed of trust executed by Boeries to said Vincent Bass on January 20, 1913, to Frank P. Bass on December 15, 1913; said original deed of trust being an exhibit to complainant's bill and showing that the assignment was an absolute assignment.

“(3) Said cross-bill shows that the mortgage from Boeries to Lena Camors Bass was without consideration.

“(4) Said Vincent Bass was without authority to deal with the deed of trust given by Felix Boeries to himself and assigned by him to Frank P. Bass, after the assignment of said deed of trust to said Frank P. Bass.

“(5) Said defendants, Boeries and Lena Camors Bass, cannot raise the question of want of consideration between Vincent Bass and his assigns, Frank P. Bass.

“(6) Said cross-bill shows that if any damage was suffered by defendants, it was *damnum absque injuria*.

“(7) Said cross-bill shows that Vincent Bass had no interest in the deed of trust on March 6, 1914, and therefore could not give a valid acquittance of the debt secured by the said deed of trust.

“(8) Said Vincent Bass could not convey by absolute assignment to Frank P. Bass to avoid, as alleged in the cross-bill, ‘a little trouble with which said Vincent Bass was threatened,’ and claim that said assignment was fraudulent. To do so would be taking advantage of his own fraud, and defendant Lena Camors Bass, claiming through said Vincent Bass, cannot attack said assignment.

“(9) Said Boeries cannot attack the assignment from Vincent Bass to Frank P. Bass, he having suffered no damage thereby.

“(10) Said cross-bill shows no privity of contract between Felix Boeries and Lena Camors Bass, and does not show that Boeries owed said Lena Camors Bass any amount whatever, and the voluntary execution of this mortgage by said Boeries to said Lena Camors Bass was without consideration and utterly null and void.”

The answer and cross-bill also shows that Vincent Bass, the promisee in the note secured by the deed of trust, is the husband of Lena Bass one of the cross-complainants and that the deed from Felix Boeries to her was executed in consideration of an agreement that Vincent Bass would

release Felix Boeries from the payment of the note secured by the original deed of trust, which the original bill seeks to have foreclosed.

Inasmuch as the cross-bill charges that Frank P. Bass is not a purchaser for value, and that he did not take the assignment of the note and deed of trust for the purpose of vesting any title or interest in him to either, it seems to us that the chancellor did not err in overruling his demurrer to the cross-bill.

It is true that the cross-bill alleges that there was some sort of agreement, presumably oral, that Felix Boeries should have the right to redeem the land by the payment of the note, but we are not now called upon to decide upon the equity of redemption, as we understand that the purpose of the cross-bill is to secure a cancellation of the original note. Vincent Bass is not a party to the cross-bill, and of course his interest will not be affected by this litigation between Frank P. Bass and cross-complainants.

If it be true that Vincent Bass released the maker of the note in consideration of the deed made to his wife, and that this was known to Frank P. Bass, who, according to the cross-bill, is a mere volunteer, we think cross-complainant was entitled to the relief prayed for.

The decree of the chancellor overruling the demurrer to the cross-bill is affirmed, and the case will be remanded for further proceedings in accordance with this opinion.

*Affirmed and remanded.*

---

GARBUTT v. STATE.

[77 South. 189, Division B.]

1. COMMERCE. *Interstate commerce. Employment agencies. Licenses.*

Laws 1912, chapter 94, requiring employment agencies hiring laborers to go out of the state, to pay a license fee of five hun-

116 Miss.]

Brief for appellants.

dred dollars in every county in which they operate, is neither a burden or tax on interstate commerce.

2. *SAME.*

This act, does not undertake to tax one who solicits or hires laborers for his own use or employment, but the tax is laid upon the person doing a regular business of emigrant or employment agent.

3. *SAME.*

Such license is not prohibitory.

4. *SAME.*

The amount of a license tax is primarily a legislative question.

APPEAL from the circuit court of Stone county.

HON. JAMES NEVILLE, Judge.

W. H. Garbutt was convicted of violation of chapter 94, Laws 1912, and appeals.

The facts are fully stated in the opinion of the court.

*Mize & Mize*, for appellants.

We submit that said act under which appellant was arrested is in violation of the Constitution of the United States and acts of Congress, and that a peremptory instruction should therefore have been given the defendant.

Chapter 94, Acts of 1912, provides that each emigrant or employment agent, or person engaged in hiring laborers or soliciting emigrants or laborers to go beyond the limits of the state, must pay an annual license of five hundred dollars in every county where he operates or solicits emigrants or laborers to go beyond the limits of the state, must pay an annual license of five hundred dollars in every county where he operates or solicits emigrants or laborers, to be paid into the state or treasury.

This statute is manifestly unconstitutional in that it imposes a tax on interstate commerce. The carrying of persons or providing for the carrying of persons from one state to another is interstate commerce. No state can

impose a tax on the transportation of persons or goods by interstate railways or other lines of interstate travel, or upon the occupation or business of carrying on interstate commerce or the offices or agencies of railways and other companies engaged in it. Black's Constitutional Law, p. 246.

The business of an agent, being to solicit passenger traffic out of California into and through other states to New York is a part of interstate commerce, which cannot be restricted or taxed by law. *McCall v. Proxee of Cal.*, 136 U. S. 104, 34 Law Ed. 391. We see no difference between this California case and the instant case.

The absence of legislation by Congress will not give a state power to regulate or tax or to impose any other restriction upon the transmission of property or telegraphic messages from one state to another. *Wabash, etc., Ry. v. Illinois*, U. S. Sup. Ct. Rep. 30 Law Ed. 244.

A state statute imposing a capitation tax on every person leaving a state by any railroad or stage coach, to be paid by the railroad companies and stage coach proprietors is invalid, as infringing the rights of citizens of the United States to pass and re-pass through every part of the country. *Crandall v. Nevada*, 6 Wall. 835 U. S. Supreme Ct. Rep., 18 Law Ed. 745.

It makes no difference as to the validity of a tax on interstate commerce whether the commerce is carried on by an individual or a corporation. *Gloucester Ferry Co. v. Penn.*, U. S. Sup. Ct. Rep., 29 Law Ed. 158. A state law which requires a party to take out a license for the carrying on of interstate commerce is unconstitutional and void. *Crutcher v. Kentucky*, U. S. Sup. Ct. Rep., 35 Law Ed. 649.

When a law of a state imposes a license tax on boats under such circumstances and with such effect as to constitute a regulation of commerce, either foreign or interstate, it is void on that account. *Moran v. New Orleans*,

U. S. Sup. Ct., 28 Law Ed. 653. A state is without authority to impose a tax or other restriction upon the transmission of persons or property or telegraphic messages from one state to another. U. S. Sup. Ct. Rep., 30 Law Ed. 244. The right to solicit or take orders for interstate business is part of interstate commerce and not subject to state regulation. *Vance v. Vandercook Co.*, U. S. Sup. Ct. Rep. 42 Law Ed. 1100.

The several states may not lay any restrictions upon immigration. It is not within the power of any state to impose taxes on such immigration or upon the masters of or owners of vessels bringing foreigners into their ports, for the privilege of so doing, or upon the aliens themselves. Such a tax would be an unlawful regulation of foreign commerce. Black on Constitutional Law (3 Ed.), Hornbook Series, p. 228; U. S. Sup. Ct. Rep. 12 Law Ed. 702. A license cannot be required by a state of an agent whose business is to solicit passenger traffic for an interstate carrier. U. S. Sup. Ct. Rep., 34 Law Ed. 391.

The court will see, from the above authorities, that the transportation of persons from one state to another is as much interstate commerce as the transportation of commodities or other property, and a reading of said authorities will show that it is wholly beyond the power of a state to pass a law requiring license from any person desiring to carry on such business. This statute plainly imposes a tax on the business of a person engaged in interstate commerce.

Furthermore we submit that said statute is absolutely void because the license fixed is unreasonable, a privilege tax must be reasonable. *Joseph v. Randolph*, 46 Am. St. Rep. 347, 71 Ala. 499.



In the face of this decision we cannot see how the court can escape the conclusion that the act under which appellant was tried is unconstitutional and void. This decision is authority for both of our contentions: (1) it is a tax on interstate commerce, and (2) the amount of license required is prohibitory.

*Earl Floyd*, assistant attorney-general, for the state.

The appellant contends that the said act is unconstitutional for the double reason that it constitutes an interference with interstate commerce, and also that the tax of five hundred dollars is prohibitory and void. In support of his contention he cites several cases touching only indirectly on the question involved, and, therefore. I will not burden the court in pointing out the obvious inapplicability of the various decisions cited by him, but will rest the state's case on a few decisions absolutely pertinent to the issue involved.

In the case of *Williams v. Fears*, 179 U. S. 270, 45 L. Ed. 199 (1900). affirming 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685 (1900), a similar statute of the state of Georgia imposing a license tax on emigrant agents engaged in the business of hiring persons to labor outside of the state was held not to be a burden on interstate commerce. The above case was followed under like conditions in *State v. Namier*, 63 S. C. 60, 41 S. E. 10 (1902): *State v. Hunt*, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758, 1901. While in the case of *Williams v. Fears*, *supra*, the question of the tax being prohibitory was not presented, yet FULLER, C. J., seized the occasion to anticipate such an attack by saying:

"The amount of the tax imposed on occupations varies with the character of the occupation. Dealers in futures are compelled to pay one thousand dollars annually for each county in which the business is carried on; circus

companies exhibiting in cities or towns of twenty thousand inhabitants or more, one hundred dollars each day of exhibition; peddlers of cooking stoves or ranges, two hundred dollars in every county in which such peddlers may do business; peddlers of clocks, one hundred dollars; and so on.

The general legislative policy is plain and the intention to prohibit this particular business cannot properly be imputed from the amount of the tax payable by those embarked in it, even if we were at liberty on this record to go into that subject.

While in the face of the above decisions upholding such laws I do not feel it necessary to add anything in justification of the legislative policy adopted by this state, yet I commend to the court the decision of Judge NETERER in the case of *Wiseman v. Tanner*, 221 Fed. Rep. 694, wherein the evils of the unregulated practice of labor agents are admirably set forth.

This case arose on the validity of an initiative act of the state of Washington, adopted by the electors of the state November 3, 1914, which declares that it has as its object the correction of a practice which results frequently in laborers becoming victims of imposition and extortion.

The appellant relies on the case of *McCall v. Cal.*, 36 U. S. 104, 34 L. Ed. 391, but inasmuch as this case and others cited by the appellant are referred to and distinguished in the case of *Williams v. Fears*, *supra*, I deem it useless to add anything to what the court has already said.

The case of *Joseph v. Randolph*, 71 Ala. 499, 46 Am. Rep. 347, 1882, held invalid a license tax imposed for inducing laborers to leave the state, but the principle laid down in that case has been unequivocally repudiated in the cases cited above, decided eighteen or twenty years thereafter.

STEVENS, J., delivered the opinion of the court.

Appellant was convicted for the violation of chapter 94, Laws of 1912, which requires each labor agent or employment agent, engaged in the business of soliciting or hiring laborers to go beyond the limits of the state, to pay an annual license tax of five hundred dollars for each county in which such agent operates. From the judgment convicting the defendant, and imposing a fine of five hundred dollars, appellant appeals.

The appeal challenges the constitutionality of the act imposing the license tax. The statute reads:

"Section 1. Be it enacted by the legislature of the state of Mississippi, that each emigrant or employment agent, or person engaged in hiring laborers, or soliciting emigrants or laborers in this state to go beyond the limits of the state, must pay an annual license of five hundred dollars (\$500) in every county in which he operates or solicits emigrants or laborers, which amount must be paid into the state treasury for the use of the state.

"Sec. 2. Any person doing the business of emigrant or employment agent without having first obtained a license, as required by law, shall be guilty of a misdemeanor, and upon conviction, shall be punished by fine of not less than five hundred dollars (\$500) and not more than five thousand dollars (\$5,000), or may be imprisoned in the county jail, or sentenced to hard labor for the county for not less than one month nor more than six months, within the discretion of the court.

"Sec. 3. That this act take effect and be in force from and after its passage."

On the contention of counsel that appellant was entitled to and was refused a peremptory instruction, the argument is directed to three points: First, that the tax imposed is a tax and burden on interstate commerce in violation of the federal Constitution; secondly, that the amount of license required is prohibitory; thirdly, that venue was not proved.

The contention that this law burdens or is a tax on interstate commerce is settled against appellant by the

following authorities: *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186, affirming 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685; *State v. Napier*, 63 S. C. 60, 41 S. E. 13; *State v. Hunt*, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758, with case note. The act, as we construe it, does not undertake to tax one who solicits or hires laborers for his own use or employment, the employer seeking labor for himself; the tax is laid upon the person doing a regular business of emigrant or employment agent. The title of the act makes this clear as does also the general language in the body of the statute, especially section 2, stating:

"Any person doing the business of emigrant or employment agent," etc.

In view of the activity of labor agents in Mississippi within the past few years, and the free emigration of laborers to other states, especially the heavy transportation of colored laborers to the Northern states—amounting the past year to a veritable "exodus"—we are not prepared to declare the tax prohibitory. The amount of the tax is primarily a legislative question.

The venue was in fact sufficiently proven.

*Affirmed.*

---

ILLINOIS CENTRAL R. CO. v. WALKER.

[77 South. 191, Division A.]

1. CARRIERS. *Live stock. Loss in transit. Burden of proof.*

When a shipper of live stock sued a connecting carrier for damages arising from delay in an interstate shipment of stock, and charged in his declaration that his contract for shipment was made with the defendant carrier through the initial carrier, and the defendant carrier filed the general issue and *non assumpsit*, in such case the burden of proof was upon the shipper to show that the contract was made as alleged in his declaration.

## Syllabus.

[116 Misa.]

2. CARRIER. *Live stock loss. Liability. Connecting carrier.*

Damages to live stock in an interstate shipment, cannot be recovered against a connecting carrier where the proof conclusively shows that the damage was done by the initial carrier.

3. EVIDENCE. *Judicial notice. Railroad ownership.*

Courts cannot take judicial notice of the ownership of railroads because such ownership has been proven in another and different case.

4. CARRIERS. *Live stock. Loss in transit. Burden of proof. Code 1906, sec. 1974.*

Code 1906 section 1974, providing that proof of signature of written instruments shall be unnecessary unless denied under oath is inapplicable where an interstate live stock shipper alleged in his declaration the execution of a contract with the defendant, a connecting carrier, which failed to deny such allegation, and this section did not remove the burden of proof of the execution of such contract from the shipper where the bill of lading on its face was made alone by the initial carrier.

5. APPEAL AND ERROR. *Harmless error.*

Error in rendering judgment against a connecting carrier for damages to live stock by the initial carrier without proof of identity of the two carriers is substantial error and not merely technical.

APPEAL from the circuit court of Clay county.

HON. T. B. WATKINS, Judge.

Suit by Ben Walker against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*Wells, May & Sanders, R. V. Fletcher and Roberts & Beckett*, for appellant.

*Gates T. Ivy*, for appellee.

HOLDEN, J., delivered the opinion of the court.

This cause originated in the circuit court of Clay county. The declaration was filed in that court on Dec-

ember 15, 1916. The suit is founded upon an alleged breach of the contract obligations of a shipping contract in interstate commerce, which shipping contract was made between the plaintiff in the court below and the Yazoo & Mississippi Valley Railroad Company for the transportation of four carloads of cattle from Wilson, a point in the state of Louisiana, to West Point, a station in the state of Mississippi. The suit is brought against the Illinois Central Railroad Company alone; the said company being a connecting carrier. The declaration alleges that at the time of the contract for the shipment of said cattle, that the said Illinois Central Railroad Company was the true owner of a system of railway known as the Yazoo & Mississippi Valley Railroad Company, and that on October 19, 1916, the Illinois Central Railroad Company, defendant, "through and under the name and style of the Yazoo & Mississippi Valley Railroad Company," entered into a contract with the plaintiff for the transportation of said cattle. The shipping contract referred to is made an exhibit to the declaration, and upon inspection it appears as a contract made by the Yazoo & Mississippi Valley Railroad Company with the plaintiff, and upon the face of the instrument the Illinois Central Railroad Company is not a party to it. The gravamen of the complaint made in the declaration is that when said contract was made, the cars upon which the cattle were to be loaded were standing upon the track ready to be loaded, and that the cattle were in fact properly loaded in good order at Wilson, La., yet the defendant wholly failed to properly discharge its duty, and did in fact negligently transport the cattle with unreasonable and unwarranted delay, and with gross negligence, so that the shipment did not arrive at destination until the evening of October 22, 1916, and that by reason of said delay the plaintiff suffered damage by shrinkage in the weight of the cattle.

To the declaration so filed by the plaintiff in the court below, the defendant, the Illinois Central Railroad Company, filed two pleas; one the general issue plea of not guilty, and the other the general issue plea of *non assumpsit*.

Issue having been joined on the pleadings as shown above, the plaintiff, in support of his declaration, produced certain testimony which appears in full in the record and the substance of which, for the purposes of this appeal, is now briefly stated: That three cars were loaded on the 18th of October and on the evening of the 19th of October. At this point it was sought to introduce the shipping contract made exhibit to the declaration, and to this introduction the defendant objected upon the ground that the Illinois Central Railroad Company was the sole defendant, and the Yazoo & Mississippi Valley Railroad Company, the initial carrier, was not a party defendant. The objection of the defendant was overruled, and the contracts were admitted in evidence. The bill of lading was also introduced in evidence and appears in the record. They both show that the contract was one made with the Yazoo & Mississippi Valley Railroad Company for an interstate shipment of four cars of cattle from Wilson, La., to West Point, Miss. The cattle were loaded at a switch track about one and one-half miles from Wilson, at a point called "Gurlie." It also appears from plaintiff's testimony that the cattle were permitted by the initial carrier, the Yazoo & Mississippi Valley Railroad Company to remain on the side tracks for a period of twenty-four hours because there was no engine there to pull them to the unloading chute. All of this was on the part of the Yazoo & Mississippi Valley Railroad Company, the initial carrier. None of this evidence was admissible as against the sole defendant, the Illinois Central Railroad Company, unless it be assumed that the two railroad companies are identical. Plaintiff

then testified that the cattle were received by him at West Point on the morning of October 23, 1916, the cars having arrived on the night of the 22d of October, and they were unloaded on the 23d. They were, according to plaintiff's evidence, in bad condition. They were hollow-eyed, gaunt, and bruised, and some of them were crippled. Upon receiving the cattle the plaintiff drove them out to his pasture, and fed them that night, and fed and watered and weighed them the next morning. They showed an average loss in weight of one hundred and nine to one hundred and ten pounds. The loss in weight under reasonable conditions should not have been more than forty pounds.

The entire claim of the plaintiff was for damages against the Illinois Central Railroad Company on account of alleged shrinkage in the weight of the cattle, caused by delay in transportation. There was no proof and no effort to prove any delay or mishandling of the shipment by the Illinois Central Railroad Company. The damage sustained was caused by the initial carrier, and if there was any unusual or unnecessary delay in handling the shipment it occurred at Wilson, La., before the cars were delivered to the defendant, the Illinois Central Railroad Company. There was no proof, and no effort was made to prove, that the defendant, the Illinois Central Railroad Company, had any relation to the initial carrier other than as a connecting carrier, under a through bill of lading, and the whole case was tried upon the assumption, without proof, that the two carriers were one and the same, and that the Illinois Central Railroad Company was liable for the default and alleged negligence of the Yazoo & Mississippi Valley Railroad Company.

The main contention of the appellant railroad company here is that the lower court erred in allowing recovery in this case against the appellant, who was a connecting carrier and guilty of no wrong; that if there



was any liability for damages for the delay in the transportation of the stock the delay was due to the negligence of the Yazoo & Mississippi Valley Railroad Company, the initial carrier, which the proof in the case conclusively shows; that the plaintiff below failed to prove the allegation in his declaration that the appellant, the Illinois Central Railroad Company, owned the Yazoo & Mississippi Valley Railroad Company, and contracted with the appellee by and through the Yazoo & Mississippi Valley Railroad Company by reason of such ownership, and having failed to prove the alleged connection between the two railroads, which was necessary in order to make the connecting carrier, the appellant, liable for the negligent delay in the transportation of the stock caused by the Yazoo & Mississippi Valley Railroad Company, the recovery is error. The appellee answers this contention by claiming that under section 1974, Code 1906, it was unnecessary for him to prove the alleged relation of ownership or identity of the two apparently distinct railroad corporations because the appellant failed to specially deny by plea verified by oath the said allegation in the declaration. We here quote the language in the brief of appellee on this point:

“The appellant, defendant below, pleaded the general issue, thus acknowledging the contract as its own, by denying their guilt of the wrong and injury alleged. The appellant did not deny the allegation under plea verified, or otherwise. It was therefore unnecessary that the plaintiff in the court below should trifle with time and vex itself with proof in the face of this statute (section 1974, Code 1906) and the attitude deliberately taken by the appellant as defendant there. Hence there can be no virtue in the contention of counsel for appellant that no proof was offered of the fact charged, and that, therefore, the court erred in admitting the tes-

timony relative to the delay at Wilson, La., plainly chargeable to the initial carrier. We therefore dismiss this phase of the controversy."

It will be observed that the appellant, Illinois Central Railroad, pleaded the general issue and *non assumpsit*. When the issues were thus joined in the lower court it became necessary for the appellee, Walker, to prove the material allegation of his declaration that the appellee contracted with appellant through the Yazoo & Mississippi Valley Railroad for the shipment of the stock. As we understand the law, no recovery can be had in a case of this kind against the connecting carrier where the proof in the case conclusively shows that the delay and damage was caused wholly by the initial carrier. *Mobile & Ohio R. Co. v. Tupelo Furniture Co.*, 67 Miss. 35, 7 So. 279, 19 Am. St. Rep. 262. The undisputed testimony in the case here shows that the appellant, Illinois Central Railroad Company, was the connecting terminal carrier, and was guilty of no negligence in handling the cars of stock; and that the delay and resulting injury was due entirely to the negligence of the initial carrier, the Yazoo & Mississippi Valley Railroad Company. There being no proof in the record connecting the two railroads in such relation as to impose liability upon the appellant connecting carrier for the negligence of the initial carrier, we are bound to hold that the lower court erred in permitting a recovery in this case.

It is suggested by the appellee that, in view of the fact that the proof in other cases decided by this court shows that the Illinois Central Railroad Company was the owner or lessor of the Yazoo & Mississippi Valley Railroad Company, we should, in some way, take judicial notice of that proof for the purposes of this case; but we know of no rule that would justify us in so doing.

The contention of appellee that section 1974 of the Code of 1906 made it unnecessary that he prove the

material allegation of the identity of the two carriers in his declaration, because the appellant failed to specially deny under oath the allegation that appellant owned the Yazoo & Mississippi Valley Railroad Company, is without merit, for the obvious reason that the statute invoked is inapplicable. Here is the statute:

“When Proof of Signature, etc., Unnecessary.—In suits founded on any written instrument set forth in the pleading, it shall not be necessary to prove the signature or execution thereof, unless the same be specially denied by a plea, verified by the oath of the party pleading the same; and it shall not be necessary in any case to prove any written signature, the execution of any instrument, or the identity or names of persons, or description of character, or the persons composing any firm or partnership which may be set forth in the pleadings, unless the same be specially denied by plea, verified by oath. And the like rule shall prevail, as far as may be applicable, in all cases where any writing is pleaded or set up by the defendant, or any signature, identity, or names of persons, description of character, or partnership set forth in his pleading.”

We must annul the judgment of the lower court in this case on the ground mentioned. The error is more than technical; it is substantial. The two railroads here in question may be one and the same railroad company, but there is no proof of such fact in this record, and we cannot depart from the long-established rules of practice and procedure requiring that proof be made of such a material allegation. Therefore we reverse the judgment of the lower court and remand the case.

*Reversed and remanded.*

CITY OF GULFPORT v. SHEPPERD.

[77 South. 193, Division A.]

1. MUNICIPAL CORPORATIONS. *Police powers. Sanitation.*

A city under its police powers as a part of its governmental duties has the right to adopt ordinances relating to the cleaning of cesspools, the removing of garbage, etc. It also has the right as one of its governmental functions to adopt an ordinance requiring that this work be done exclusively by any party designated to do it by the city.

2. MUNICIPAL CORPORATIONS. *Police powers. Sanitation. Governmental functions.*

The adoption of ordinances regulating the cleaning of cesspools and removing garbage, and requiring it to be done only by a sanitary contractor chosen by the city, are "governmental functions" and the city is not liable in damages for injuries caused by the negligent performance of such work.

3. MUNICIPAL CORPORATIONS. *Injuries to persons. Sanitation. Negligence of employee.*

Where a sanitary contractor was designated by the city but whose work was on behalf of property-owners and paid for by them he was not an employee of the city but an independent contractor and it was not liable for injuries to pedestrians caused by the negligence of his employee in replacing the cover of a cesspool which he had cleaned out.

APPEAL from the circuit court of Harrison county.

HON. J. H. NEVILLE, Judge.

Suit by Mrs. J. H. Shepperd against the City of Gulfport. From a judgment for plaintiff, defendant appeals. The facts are fully stated in the opinion of the court.

J. L. Heiss, for appellant.

The position assumed by us in the court below, and the one we shall assume and present now is that this case should never have been permitted to go to the jury, be-

cause, admitting the verity of everything testified to on behalf of the appellee, she was not entitled as a matter of law to recover from this appellant.

All that these facts could show is that the appellant, the city of Gulfport, adopted an ordinance providing for the cleaning of cesspools, etc., and forbidding the work to be done by any other than the sanitary contractor of the city, or other authorized person, and fixing the price at which this work should be done. That this sanitary contractor was called on complaint of the appellee and performed the work for which he was paid by the landlord of the appellee; that in the performance of this work the sanitary contractor negligently failed to properly place the cover on the cesspool, by reason of which the appellee fell therein and was injured.

To maintain her right to action against the city, the appellee must stand upon two propositions of law, (1) that in performing the work complained of, the sanitary contractor was acting as the agent of the appellee and not an independent contractor; (2) that in addition thereto, the work was of such character that the principal of *respondeat superior* applies. We assert that neither of these propositions is true in this case, and it is upon this that we found the various assignments of error.

It is manifest that the entire questions turn around the question of the character of work being performed, and of prime importance is the ordinance under which the work was being done. We submit the following synopsis of the various sections of this ordinance which touch upon this case as follows:

Section 1, places the construction of cesspools under the supervision and approval of the city health officer.

Section 2, prescribes the size and manner of constructing cesspools.

Section 5, requires the cleaning of all cesspools to be done exclusively by the sanitary contractor of the city or by such person as may be designated and authorized by

116 Miss.]

Brief for appellant.

the mayor and board of aldermen; and provides a plan for the registering of calls for the sanitary contractor in a book kept for that purpose which is required to be examined daily by the sanitary contractor and sanitary inspector.

Section 6, fixes the charges that shall be paid by the owner or occupant of premises for the cleaning of cess-pools, and the time and condition under which they must be cleaned.

Section 9, provides that the sanitary contractor or other authorized person doing the work shall have the right to demand payment for the cleaning at the time the work is done, and, should payment be refused, to clean the cess-pool, and make affidavit of the premises being in the unsanitary condition.

Section 26, provides that the sanitary work provided for in the ordinance shall be done under the immediate direction of the city health officer.

Section 29, provides that the board shall, at stated times, receive bids and let out to the lowest and best bidder, for the term of one year, the exclusive privilege of cleaning and disinfecting cesspools, etc., with the right to reject all bids or to do the work by employees of the city.

Section 30, requires that the bids shall provide for the doing of the work at the prices fixed in the ordinance.

Section 35, provides that the sanitary contractor shall enter into bond in the sum of \$500.

The first assignment of error is based upon the refusal of the court below to sustain the motion of appellant asking the evidence to be excluded from the jury and a peremptory instruction given, because no liability was shown to lie against the appellant for the following two reasons; (1) that the work complained of was that of an independent contractor and not that of an agent of the city; (2) because the acts of the city under the ordinance in question was in the performance of the governmental function of protecting the public health.

We submit this motion should have been sustained upon the two grounds named, which we desire to present in the order named. (1) The work was that of an independent contractor. McQuillin Municipal Ordinances, section 453; 2 Dillon, Municipal Corporations (5 Ed.), sec. 670, notes; *California Reduction Co. v. Sanitary Reductions Works*, 199 U. S. 300.

The case presented upon the authorities and principles laid down is simply this: The municipality has the right to direct how a cesspool shall be cleaned; by whom it shall be cleaned and the price that is to be paid for the cleaning. It therefore follows that the contract for the actual work is made between the owner or occupant of the premises and the man designated to do the work, and no act of negligence on the part of the sanitary contractor can give rise to a cause of action against the municipality.

The second ground upon which we submit that our first assignment of error is well taken, is that in any event, even though it should be considered that the sanitary contractor was at the time acting as an employee of the appellant, the doctrine of *repondeat superior* does not apply because of the class of the work engaged in. McQuillin, Municipal Corporations; sec. 2625; 6 McQuillin, Municipal Corporations, sec. 2630; 6 Thompson on Negligence, secs. 5826, 5786; 4 Dillon, Municipal Corporations, p. 2898, secs. 1656, 1660; Vol. 1, sec. 116, p. 199 and 200; 1 Abbott, Municipal Corporations, sec. 939; 1 Abbott, Municipal Corporations, sec. 967; 28 Cyc. p. 1340; 6 McQuillin, Municipal Corporations, sec. 2695. See full list of authorities cited thereunder, including *Semple v. Vicksburg*, 62; Miss. 63; *Missane v. City of New York*, 160 N. Y. 123, 54 N. E. 744; *Haley v. Boston*, 191 Mass. 291; *Semple v. Mayor, etc., of Vicksburg*, 62 Miss. 63; *Alexander v. City of Vicksburg*, 10 So. 62; *Long v. Mayor, etc., of City of Birmingham*, 49 So. 881.

We therefore most earnestly submit that error was committed in the court below, and that this court should reverse the judgment rendered herein and enter judgment here for the appellant.

*Mize & Mize and J. W. Morse, Jr., for appellee.*

As to the first contention of appellant, that the sanitary contractor was an independent contractor, we think that a reading of the ordinance will set this contention at rest.

In short, he was entirely and absolutely under the direction of the city in the performance of his work, by the provisions of this ordinance, which ordinance, as above stated, compelled all occupants and owners of premises to employ this particular man to do this work. He was, in fact, an officer of the city, charged with certain duties to be done in the manner fixed by the ordinance under the supervision of the city health officer, for which duties he was to collect from the owner or occupant certain fees fixed by the ordinance.

An independent contractor is well defined as one, who, in rendering service, represents the will of the employer only as to results, and not as to the means of doing the work, the test being whether the employer reserved control over him as to the manner of doing the work. *Kipp v. Oyster*, 114 S. W. 538, 133 Mo. 711; *Green v. Soule*, 78 Pac. 337, 145 Cal. 96; *Moore-Savage Co. v. Kopplin*, 135 S. W. 1033.

So we submit that there is no merit in the contention of appellant that the sanitary inspector was an independent contractor. As to appellant's contention that the work was a governmental function for which the city is not liable, we submit the case of *Mary Semple v. Vicksburg*, 62 Miss. 63.

In conclusion in favor of our contention, holding that a city is liable for the acts of its workmen in construct-



ing gutters, sewers, etc., where the acts are purely ministerial, involving the exercise of no governmental powers or judicial functions. This is clearly stated in 4 Dillon on Corporations (5 Ed.), sec 1739, et seq.; p. 3047, et seq.; 3 Abbott on Municipal Corporations, sec. 959, p. 2229; *Fernandez v. City of Pass Christian*, 100 Miss. 76.

In the case at bar, we submit, a large stretch of the imagination indeed is required to discern a governmental function in the work done by a negro under the direction of a city sanitary inspector in cleaning a cesspool.

As laid down in the authorities *supra*, we submit that the city sanitary inspector in doing this work was simply performing a ministerial duty on behalf of the city in maintaining reasonably safe and sanitary condition of a cesspool in execution of a plan adopted and put into effect under the aforesaid ordinance of said city. Cyc., lays down the same proposition as to the construction, maintenance and repair of sewers, etc., in Vol. 28, 1315, paragraph 3.

Counsel for appellant cites *Haley v. Boston*, 191 Mass. 291, which is also found in 5 K. R. A. (N. S.) p. 1005, but our court, in the cases, *supra*, declined to follow that line of decisions, and in that case the court said that liability for negligence in the construction or maintenance of sewerage comes under this doctrine, to wit: the city is liable, and cites. *Manning v. Springfield*, 184 Mass. 245, 68 N. E. 202.

The case was submitted to the jury on instruction putting the issue squarely to it, as to whether or not the jury believed it was negligently left open and whether or not plaintiff was injured thereby, and, on this conflict of evidence, the jury found in favor of appellee; and we submit that the peremptory instruction was properly refused and that the case should be affirmed.

SYKES, J., delivered the opinion of the court.

The appellee, Mrs. Shepperd, sued the city of Gulfport in the circuit court for damages for personal injuries sustained by her on account of the negligence of an alleged employee of the city. She recovered a judgment for three hundred and fifty dollars, from which judgment this appeal is prosecuted.

The negligence alleged in the declaration and proven to the satisfaction of the jury consisted in the failure of one Currie to properly fasten the top on a cesspool cleaned out by him on premises rented by the appellee. The night the cesspool was cleaned out, the appellee, in returning to her home, stepped on the top of the cesspool, which gave way or tilted with her because of its being improperly placed thereon, thereby, causing appellee to fall into the cesspool and sustain certain personal injuries. There was ample evidence to sustain the verdict of the jury as to the negligence of the party who did the work. The defense presented to this court, and upon which the appellant city relies, is that it is not liable: First, because Currie, the party who did the work, designated as the city sanitary contractor, was not an employee of the city in the doing of this work, but was an independent contractor, for whose negligence the city is not responsible; second, that even if the said Currie was an employee of the city, the city is not responsible in this case, because the city under its police powers, which it exercises as a part of its sovereignty, was having this work done, and this character of work falls under the governmental powers of the city, and it is not responsible for the negligence of its agents or officers in the performance of any duties which fall under, or belong to, the police power.

At the time of the accident in question the city of Gulfport was operating under the municipal chapter of the Code of 1906. It had duly and legally adopted an ordinance providing for the keeping of the city of Gulfport in proper sanitary condition. Among other sections of this ordinance was a provision providing for the clean-

ing of cesspools outside of the fire limits of the city by the city sanitary contractor, and that the owner or occupant of the premises should pay to this contractor the sum of three dollars for the cleaning of the cesspool. It is also provided that these cesspools shall be inspected at certain times, and that they shall be kept in a sanitary condition. The sanitary contractor, or other person designated by the mayor and board of aldermen, shall demand of the owner or occupant the payment of this fee, and if he refuse to pay the same, affidavit shall be made against him. There is a book kept at the police station in which citizens may register their complaints and requests on the sanitary contractor to do the sanitary work. It is also made the duty of the sanitary officers of the city to examine this book twice a day and look after the complaints and requests. The sanitary work done by the sanitary contractor shall be done under the immediate direction of the city sanitary inspector, who acts under the direction of the city health officer and the ordinances of the city. It is provided that the sanitary inspector shall see that the sanitary work is done in a proper manner, and shall direct the cleaning of those premises which need cleaning. It is further provided that the mayor and board of aldermen once a year shall receive bids and let out to the lowest and best bidder for the term of one year the exclusive privilege of cleaning and disinfecting privies and cesspools on premises in the city outside of the fire district. The prices for doing this work are also fixed by the ordinance. The person to whom the contract for this sanitary work is awarded shall be known as the sanitary contractor, and it is made his duty to inspect the premises of citizens of the city outside of the fire district for the purpose of ascertaining and determining the sanitary condition of the same and to clean all privies and cesspools. This sanitary contractor is required to enter into a bond in the sum of five hundred dollars to be approved by the mayor and board of aldermen conditioned to properly and faith-

fully perform all the duties according to the terms of his contract. In addition to the cleaning of cesspools on private property, he also does certain work for the city in removing garbage and trash from the streets. It is also made unlawful for any other persons than the sanitary contractor to engage in the business of cleaning privies, cesspools, and premises for the public.

Under the above ordinance the contract for the period in question here for doing the sanitary work was let to one Dave Currie. The cesspool was cleaned by a negro hired by Currie to do the work. Currie testified that after the work was done he inspected the same, and it was all right. His testimony, however, was contradicted by that of the plaintiff, and the jury settled the fact adversely to the contention of Currie and decided that the work was improperly or negligently performed.

From an examination of the authorities in this state and elsewhere it is manifest that the city under its police powers, as a part of its governmental duties, had the right to and did adopt the ordinances relating to the cleaning of cesspools, the removing of garbage, trash, etc. It also had the right as one of its governmental functions to adopt the ordinance requiring that this work be done exclusively by any party designated to do it by the city. In the case before us it could only be done by the city sanitary contractor. In the regulation of the public health this ordinance was properly adopted. In the cleaning of cesspools on private property the city received no remuneration for that work whatever. In the protection of its citizens it fixed the price to be paid for this character of work and that the contractor could charge no more. This was an ordinance adopted solely for the benefit of the citizens, for which the city in no way received any remuneration. As was said in the case of *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 26 Sup. Ct. 100, 50 L. Ed. 204:

“It is the duty, primarily, of a person on whose premises are garbage and refuse material to see to it, by proper diligence, that no nuisance arises therefrom which endangers the public health. The householder may be compelled to submit even to an inspection of his premises, at his own expense, and forbidden to keep them, or allow them to be kept, in such condition as to create disease. He may, therefore, have been required, at his own expense, to make, from time to time, such disposition of obnoxious substances originating on premises occupied by him as would be necessary in order to guard the public health.”

In the absence of the above ordinance, it would have been the duty of the owner or occupant of the premises to have cleaned the cesspool and kept it in a sanitary condition. For the benefit of the householders and of the public generally this ordinance was passed not only requiring the cleaning of the cesspool, but fixing the price to be paid to the contractor by the householder for the doing of the work. The fixing of the price was a protection to the householder to prevent the contractor from fixing any arbitrary price he might elect. The adoption of this ordinance and the selection of the sanitary contractor were purely governmental powers exercised by the city under its police powers. *McQuillin on Municipal Ordinances*, section 453; *Dillon on Municipal Corporations* (5 Ed.), vol. 2, section 670. The distinction is recognized in the authorities in Mississippi and by all of the leading text-books between the exercise by a municipality of governmental or public functions and private powers; that in the exercise of governmental powers the city is clothed with a sovereignty, and is not responsible in damages therefor, but that in the exercise of private powers the doctrine of *respondet superior* applies to it as to other masters.

For a discussion of this question, see *McQuillin on Municipal Corporations*, sections 2625 and 2630; *Thompson on Negligence*, vol. 6, sections 5826, 5786; *Dillon on*

Municipal Corporations, vol. 4, sections 1556 and 1660; Abbott on Municipal Corporations, vol. 3, section 939.

There is no contention in this record that the city, in letting the contract to Currie, was negligent in any manner, or that it selected an improper party to do the work. The contention of the appellee is that Currie was an employee of the city, and for that reason that the city is liable. To sustain his contention the able counsel for appellant cites the cases of *Mary Semple v. Vicksburg*, 62 Miss. 63, 52 Am. St. Rep. 181, *Pass Christian v. Fernandez*, 100 Miss. 76, 56 So. 329, 39 L. R. A. (N. S.) 649, and certain text-books and cases from other states. The cases in Mississippi relied upon by appellant are cases where the work of taking care of streets or removing garbage from streets was being done by an employee under the control and in the pay of the municipality. It was work which primarily rested upon the city to do, and in the actual doing of the work in those cases the employee was not exercising any governmental powers, but was merely performing a ministerial act, in the *Semple Case* stopping up inlets into a drain of a street, and in the *Fernandez Case* removing garbage in a city wagon from the street.

In the cleaning of the cesspool of the appellee the remuneration was to go solely to the contractor. The city, further than to see that his work was properly done, in no way attempted to supervise the details of the doing of the work. These details were left altogether to the party doing the work. The ordinance in effect only gives an exclusive privilege or license to the city sanitary contractor to do this character of work for the householders. He must do it in a proper manner as regards especially the general results, viz., it must be done in a sanitary way, but the actual details of how he performs the work are not in any way attempted to be interfered with or supervised by the city. In this case he was an independent contractor doing

the work for the benefit of the owner or occupier of the house under the city ordinance, and the city is not responsible for his negligence.

The judgment of the lower court is reversed and judgment will be entered here in favor of the city.

*Reversed, and judgment here.*

ADAMS, STATE REVENUE AGENT, v. FIRST NAT. BANK OF GULFPORT.

[77 South. 195, Division A.]

1. TAXATION. *Taxation by state. National banks.*

While it is true that a national bank is not subject to taxation upon its capital stock by the state or any subdivision thereof yet the shares into which its capital stock is divided, and which are the property not of the bank but of the holders thereof may be taxed under the provisions of U. S. Revised Statutes, section 5219 (U. S. Comp. St. 1916, section 9784), and the taxes imposed thereon may be collected in the first instance from the bank itself "as the debt and in behalf of the shareholders, leaving to the corporation the right to reimbursement for the tax paid, from the shareholder."

2. SAME.

And such is the object sought to be accomplished by Code 1906, section 4273, Hemingway's Code, section 6907, under which the tax is imposed.

3. SAME.

That this statute makes no provision for a recovery by the bank from its shareholders, for the taxes paid by it pursuant thereto is not material for the reason that such recovery may be had "under the general principle of law that one who pays the debt of another, at his request can recover the amount from him."

APPEAL from the circuit court of Harrison county.  
HON. J. H. NEVILLE, Judge.

Proceeding by Wirt Adams, state revenue agent,

against the First National Bank of Gulfport. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

*Mayes & Mayes and Mize & Mize*, for appellant.

The question presented to the court here is this: Is the property of the First National Bank of Gulfport taxable that is set out in the state revenue agent's claim before the board of supervisors, which constitutes the basis of the complaint in this cause, to wit, capital stock, surplus, undivided profits, and any and all other property, assessable to the bank which had escaped taxation by reason of not having been assessed?

On the authority of the case of *Owensboro National Bank v. Owensboro*, 173 U. S. 664, the state is vested with the general power to impose a tax directly on a national bank, and the authorities therein cited are ample to sustain this contention.

To the same effect is *Aberdeen First National Bank v. Chehallis Co.*, 166 U. S. 440; also *Marguire v. Board of Revenue*, 71 Ala. 401, and our own state authority in cases of *Vicksburg Bank v. Worell*, 67 Miss. 47; *Bank v. Oxford*, 70 Miss. 504.

The latest case on this point, which we claim is absolutely decisive of our contention, is that of *First National Bank of Jackson, Mississippi, v. McNeel, Internal Revenue Collector*, decided by the United States circuit court of appeals for this, the 5th Circuit, on Jan. 8, 1917; 238 Fed. Rep. 559, which affirmed the case of *Bank v. Oxford*, 70 Miss. 504, and construing the statute on the subject, uses the following language:

"The statute, as so construed, imposes the tax, not on the bank or its capital, but upon the shareholders; the bank being required to pay for them. The absence of express provision in the statute giving the bank the right to recover from its several shareholders their proportional parts of the amount so paid for them does not show



that there is no such right of recovery, or that the intention was for the tax to fall ultimately upon the bank and not upon its shareholders. *Home Savings Bank Co. v. Des Moines*, 205 U. S. 503.

"That the tax fell upon the shareholders and not upon the bank is sufficiently shown by the language of the statute, giving it the meaning which the supreme court of Mississippi has found that it expresses. The conclusion is that the payment in question was not for 'taxes imposed' within the meaning of those words as used in the provision of the corporation tax act as to the deductions allowable in ascertaining the corporation's net income, as the tax in question was imposed, not on the corporation, but upon its shareholders," citing a number of authorities.

We think this case absolutely decisive of our contention and it is supported by the other authorities cited in this brief. See, also, *Bank of Magnolia v. Pike County*, 72 So. 697.

We therefore respectfully submit that the case should be reversed and remanded and the appellee held liable for back taxes on the property set out in the schedule set out in the record.

*Griffith & Wallace*, for appellee.

We take it that nothing is better settled or freer from dispute than (1) that the shares of stock in a national bank are owned by and belong to the individual shareholder and are not in anywise the property of the bank, and (2) that a national bank and such property as it owns (which does not include the shares of stock therein) can only be taxed by a state in the manner and within the limits permitted by congress. These are propositions which over and over have been declared by the supreme court of the United States and are manifest on principle besides. Secs. 5210 5219, Rev. St. U. S.; *Owensboro National Bank v. Owensboro*, 43 L. Ed. 850; *First National Bank of Albuquerque*

v. *Albright*, 52 L. Ed. 614; *Bank v. Chehalis Co.*, 41 L. Ed. 1069. *Bell v. Pennsylvania*, 33 L. Ed. 896; *Van Slyke v. Wisconsin*, 20 L. Ed. 240; *Charleston Nat'l Bank v. Melton*, 171 Fed. 743; *Eliot Nat'l Bank v. Gill*, 134 C. C. A. 358; 37 Cyc. 833; *First National Bank v. City of Richmond*, 39 Fed. 309; *National Bank of Va. v. Richmond*, 42 Fed. 877; *Brown v. French*, 80 Fed. 166; *First National Bank v. Lampasas*, 78 S. W. 42; *Miller v. First National Bank*, 21 N. E. 860; *First National Bank v. Fisher*, 26 Pac. 482; *Tiffany on Banking*, 436-7.

We submit that there may be "a stretch and a strain if it be willed" but nothing less than a judicial complement, supplying appropriate legislation can make ends meet here, and as to this proceeding for want of notice in writing to the owners, there is no possibility of bridging the very fundamental requirement as to having the parties in court. We submit that the judgment should be affirmed.

SMITH, C. J., delivered the opinion of the court.

This is a proceeding in which the revenue agent is attempting to back-assess the shares of appellee's capital stock, together with the accumulations thereon for the years 1902 to 1907, inclusive, during which it is alleged that these shares have escaped taxation. Appellee is a national bank, and claims, and the court below held, that the tax is imposed against it upon its capital stock as such, which the state is without power to do. It is true that a national bank is not subject to taxation upon its capital stock by the state or any subdivision thereof, but the shares into which its capital stock is divided, and which are the property not of the bank but of the holders thereof, may be taxed under the provisions of U. S. Revised Statutes, section 5219 (U. S. Comp. St. 1916, section 9784), and the taxes imposed thereon may be collected in the first instance from the bank itself, "as

the debt and in behalf of the shareholders, leaving to the corporation the right to reimbursement for the tax paid from the shareholders" (*Home Savings Bank v. Des Moines*, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed. at p. 910; *First National Bank v. McNeel*, 238 Fed. 559, 151 C. C. A. 495); and such is the object sought to be accomplished by the statute by which the tax here sought to be collected is imposed (*Bank v. Oxford*, 70 Miss. 501, 12 So. 203; Constitution, section 181; Code of 1906, section 4273; Hemingway's Code, section 6970. That the statute makes no provision for a recovery by the bank from its shareholders for the taxes paid by it pursuant thereto is not material, for the reason that such recovery may be had "under the general principle of law that one who pays the debts of another, at his request can recover the amount from him." *Home Savings Bank v. Des Moines*, *supra*.

*Reversed and remanded.*

---

LEWIS v. MYER.

[77 South. 297, In Banc.]

1. PUBLIC LANDS. *Lease. Timber cutting by trespasser. Compromise. Sixteenth section.*

The owner of the lease to a sixteenth section has such an interest in the timber growing on the land as will entitle him to recover damages for the wrongful removal of the timber by a third person, even though after the timber was cut from the land there remained on the land a plenty of timber for estovers.

2. SAME.

In such case the owner of the lease may recover on a note given him in compromise by one who has wrongfully cut timber thereupon.

APPEAL from the circuit court of Smith county.

HON. W. H. HUGHES, Judge.

Suit by Joseph Myer against J. S. Lewis. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*J. P. Guthrie*, for appellant.

There is involved in this case, the question of whether or not the lessee of sixteenth section land has such title vested in him as gives him the right to sue for and recover for timber cut, where there is plenty of timber left for estovers. The special plea in this case alleges that the check sued on was given for a compromise settlement of timber cut by appellant, and further alleges that there was plenty of timber left on the premises for estovers. This being the allegations of the plea, it was certainly a question upon which the evidence should have been introduced, and which should have been decided by the jury in case the evidence supported the plea.

The court is familiar with what constitutes estovers, and we deem it unnecessary to enter into any elementary definition of what this term means in legal phraseology. Mr. Tiedeman in his Third Edition on Real Property, at page 68, section 507.

Mississippi courts are very clear on the question of liability of a tenant for waste on sixteenth section lands. The case of *Board of Supervisors of Warren County v. Gans et al.*, decided in 90th Mississippi, page 76, 31 So. 539, was a case in which the board of supervisors of that county instituted an action of replevin, to recover certain logs which had been cut from sixteenth section land leased for a period of ninety-nine years. The lessee in this case had sold the timber while standing, and their purchasers had cut and felled the timber from the land, and in this case it was contended that they were not liable, and that the action of replevin would not lie to recover the timber by the board of supervisors for the

reason that it was the intention of the lessees to clear the land for cultivation, and because the trees thereon impeded the cultivation of the fields already cleared and in cultivation. The court in that case gave a peremptory instruction for the defendant. 4 Kent, Comm. pg. 76, et seq., and notes; *Jackson v. Brownson*, 7 Johns. 232, 5 Am. Dec. 258; *Mooers v. Wait*, 3 Wend. 104, 20 Am. Dec. 667.

Other cases supporting the same contention are *Walt-ern v. Loeery*, 74 Miss. 480, 21 So. 246; *Learned v. Ogden*, 80 Miss. 769, 32, So. 278, 92 A. S. R. 621; *Cannon v. Barry*, 50 Miss 289; *Jefferson Davis County v. James-Sumerall Lumber Company*, reported in 94 Miss. 430, 49 So. 611; *Jefferson Davis County v. Long et al.*, 94 Miss. 538, 49 So. 613; *Moss Point Lumber Company v. Board of Supervisors of Harrison County*, reported in 89 Miss. 448, 42 So. 290, and 873.

Section 4700 of the Code of 1906, provides among other things, that, "No timber shall be cut or used by the lessees except for fuel and necessary repairs and improvement on the land." So, also *Warren County v. Gans*, 80 Miss. 76, 31 So. 539, cited *supra*. For the rights of the landlord to sue for an injury to the freehold, see 24 Cyc., pages 925, 930, 931 932. Also note to *Beakly v. Board*, annotated cases 1912-D, pages 120 and 123; *Winston v. Franklin Academy*, 28 Miss. 118; *Rigby Fertilizer Company v. Scott*, 56 So. (Ala.) 834, all of which authorities and weight of authority hold that the landlord has a right to sue for an injury to the freehold, where such injury operates against the reversionary estate of the landlord. In the case at bar, so far as the pleadings show, the only injury that could have been possible to the estate, was the injury to the reversionary interest, because the pleadings allege sufficient estovers, certainly the lessee had no right to the timber on the land in question, except his right in the estovers.

On the question of waste committed by a stranger see 40 Cyc. at page 515. *Baker et al. v. Hart et al.*, 123 N. Y. 470, 25 N. E. 948, 12 L. R. A. 60; *Grub v. Bayard*, 2 Wall Jr., 81; *Doe v. Wood*, 2 Barn. & Ald. 724; *Clement v. Youngman*, 40 Pa. St. 480; *Arnold v. Stevens*, 24 Pick. 106. But it is sought to be sustained on another theory. The doctrine is invoked that a tenant for life or years is bound to answer to the owner for any waste committed, even though it be the act of a stranger. Such is undoubtedly the rule. *Cook v. Transportation Co.*, 1 Denio. 91, 104. But it applies to the case of a tenancy. It proceeds upon the ground that the leased premises have passed into the possession of the tenant, so that an entry, unless under some special reservation, by the lessor himself would be a trespass. The latter cannot protect the premises, because for the time being he has parted with the possession, and intrusted it to the lessee and the latter, having become the custodian and possessor of the land, comes under an implied obligation not to commit waste upon it, and not to permit others to do so. But the rule and its reason are alike inapplicable where not an estate but a mere incorporeal hereditament is transferred.

Submitting the case on the whole record, and on the authorities cited and quoted from, we submit that the court erred in sustaining the demurrer of appellee, plaintiff in the court below, and that the case should be reversed, because of the error committed by the trial court.

*O. S. Cantwell*, for appellee.

The record in this case shows that the consideration or the compromise and settlement was based upon the trespass of the defendant in cutting certain trees upon sixteenth section land leased by the plaintiff, and that the board of supervisors had not sold the timber. Appellant contends that since the timber had not been sold by the board of supervisors and that there was enough esto-

vers left after the trespass was committed, that the plaintiff had no vested right to the timber already cut and removed. We submit that if it be true, which we deny, that the plaintiff had no right in the timber if there was left sufficient estovers, that still his defense as set up in the special plea was insufficient in law for the reason that defendant by his act in compromising and settling the claim admitted that there was not sufficient estovers left after this timber was cut, this therefore could not have been a question for the jury.

Without going into a lengthy discussion of the many sixteenth section cases found in our reports we beg to call the court's special attention to the case of *Fernwood Lumber Company v. Rowley et al.*, 71 So. 3, and the case there cited. In our judgment this case settles beyond question the rights plaintiff had in the timber cut and removed from the leased sixteenth section in question and shows beyond doubt that there could be no room to question the basis of settlement had by these parties from the trespass admitted by the pleadings to have been committed. It will be noted in the case, just cited, that the lumber company only held a deed to the timber from the lessee of the sixteenth section and had never purchased the timber from the board of supervisors, which in practical effect is the same situation as the appellee, while Bourn and Williamson's predecessor in title had purchased the timber from the board of supervisors, which is more than is claimed for the appellant in the case at bar. The court held in this case that Bourn and Williamson was liable to the lumber company in damages for the value of the timber cut and removed by them.

So we think in this case that as the parties agreed in the compromise and settlement that the value of the timber cut and removed was the amount as stated by the check given by this defendant to the plaintiff's attorney and endorsed by him to the plaintiff, the court below was correct in sustaining the demurrer to the special

plea of the defendant, and upon the refusal of the defendant to plead further, awarding judgment for the plaintiff, and that therefore the judgment of the lower court should be affirmed.

Cook, P. J., delivered the opinion of the court.

This case was first instituted in the justice's court, the same being a suit to recover on a check for sixty-five dollars, executed by I. S. Lewis on March 10, 1916, and payable to W. B. Burns, or order, and indorsed as follows:

"Pay to the order of Joseph Myer without recourse. W. B. Burns."

The suit was dismissed in the justice's court, and Joseph Myer appealed to the circuit court, where the following plea in this cause was filed:

"Comes the defendant in the above and foregoing cause, and for plea in this behalf says that the defendant in this cause did give his certain check as alleged in the declaration and for the amount as therein stated, as a compromise and settlement of a certain claim taken up with him by the attorney for the plaintiff in this cause, and the defendant also admits that he requested the bank upon which this check was drawn not to pay the same, but defendant further says in this, his plea to the declaration filed, that the plaintiff in this cause ought not to have and recover the amount sued for, because the defendant had the right under the law, not to pay said check, and the right to give instructions to the bank not to honor the same; that the check was given, and the consideration for the same was that defendant had cut certain timber on sixteenth section land of section 16, township 4, range 6 east, in Smith county, Miss., which said lands were owned, or the leasehold interest therein was owned and claimed, by said plaintiff for the unexpired term of the lease thereon at the time this check was given, and that the check



given therefor was supported by an illegal consideration in this, to wit, that the plaintiff had no such right to the timber on said land as to entitle the said plaintiff to recover therefor, for any trespass or otherwise but the only party who could recover for said timber was the county of Smith, plaintiff not having bought the timber from the board of supervisors, and there being plenty of timber left for estovers, in which the title to said timber vested, and who was the only party entitled to recover therefor, and this the defendant is ready to verify."

A demurrer was filed to this plea, setting forth that the special plea is insufficient in law; that said plea presented no defense to the cause of action herein. The court sustained the demurrer, and the defendant in the court below, appellant here, declined to plead further, and judgment was rendered in favor of the plaintiff, Joseph Myer, for the sum of sixty-five dollars, with interest, making a total of sixty-seven dollars and forty-four cents, and it is from this judgment of the court that the case is appealed to the supreme court.

The appellant rests his case upon the averment of the plea wherein the defense set out is that the compromise settlement was void because it appears that after the timber was cut from the land there remained on the land a plenty of timber for estovers.

It is argued that the lessee of the sixteenth section did not have the right to cut the merchantable timber standing on the land except when the timber was to be used for estovers, and therefore he had no cause of action. We do not think that this is an open question in this state. In the recent case of *Fernwood Lumber Co. v. Rowley*, 110 Miss. 821, 71 So. 3, this court expressly decided that the owner of the lease to a sixteenth section had such an interest in the timber growing on the land as would entitle him to recover damages for the wrongful removal of the timber by a third person. It was also decided in

that case that the board of supervisors did not have the power to convey the timber to any one save the lessee or his assignees.

Referring to a situation similar in principle to the present case, this court, in *Baggett v. McCromack*, 73 Miss. 552, 19 So. 89, 55 Am. St. Rep. 554, said:

“The appellee, as borrower of the horse, had possession of and a special or transient property, for the time, in the animal, and was entitled to bring his action against a wrongdoer by whose negligence the animal was lost or destroyed. He had no legal interest in the animal as against his bailor, but he had a real interest, nevertheless, in the custody and care of the property, because he was liable to the lender for it, and his possession of and special interest in the horse gave him an action against a wrongdoer. Either the lender or the borrower may bring suit in cases of this character, but a recovery by one of them may be pleaded in bar of any suit by the other for a like recovery; the bailee’s suit for the naked value only of the property, and a recovery therein, being in trust for the real owner. Schouler’s Bailment, pp. 63, 64, 86; Story on Bailments, 94, 234; *Woodman v. Nottingham*, 49 N. H. 387, 6 Am. Rep. 526; 2 Am. & Eng. Enc. L. 61, note 2, and cases there cited.

“The other contentions appear to us to be without merit. Affirmed.”

The declaration set out a cause of action, and the plea does not present any defense. On the contrary, the plea in legal contemplation confesses the right of plaintiff to recover.

*Affirmed.*

ETHRIDGE, J. (dissenting). I cannot concur in the decision of the majority in this case. The check upon which the suit was brought was given to W. B. Burns as a compromise for the cutting of timber standing on sixteenth section lands, of which the payee was lessee. This check

was indorsed to Myer, without recourse. The plea alleges that the defendant, Lewis, had cut certain timber on sixteenth section lands on which the county was the owner of the timber, and the title to the timber was vested in the county, and the county was the only party entitled to recover therefor, and that there was sufficient timber left for the use of the plantation or for estovers. The majority opinion undertakes to justify the decision upon the theory that Burns was lessee, and that he had the right to recover the full damage under the authority of *Baggett v. McCormack*, 73 Miss. 552, 19 So. 89, 55 Am. St. Rep. 554. In that case the court held that a borrower of a horse had a right to recover for the conversion of the horse by a wrongdoer by whose negligence the animal was lost or destroyed. The court used this language:

“Either the lender or borrower may bring suit in cases of this character, but a recovery by one of them may be pleaded in bar of any suit by the other for a like recovery; the bailee’s suit for the naked value only of the property, and a recovery therein, being in trust for the real owner.”

The doctrine of that case is that the borrower was a trustee for the owner, and that, as trustee, he had a right to institute suit for the owner and recover for the benefit of the owner. That does not authorize the trustee to compromise the beneficiary’s rights without the consent or knowledge of the beneficiary. The trustee in that case had power to bring suit and recover the full value, not for himself, but for the owner. In this case Burns not only compromised the county’s right without the consent of the county, and thus deprived the school children of the township of their rights, without the consent of their representative, but he assigns the check accepted in settlement without recourse on him, thus showing on the face of the check circumstances of suspicion. There is no allegation or proof of any knowledge on the part of the county to this assignment, nor is there any proof or any allegation that the suit was instituted for the benefit of

the county. There is a distinction, in my judgment, between the right of a bailor intrusted with the possession and control of property and the right of a lessee or tenant to bring an action for the recovery of timber taken from the premises to which he had no right, and the title to which was in another party. In my opinion, this court has committed itself to doctrines contrary to the majority opinion in former decisions of the court. In *Warren County v. Gans*, 80 Miss. 76, 31 So. 539, this court held that where timber was wrongfully cut from sixteenth section, the county's right thereto immediately vested, and the county could maintain replevin against the lessee for the timber. Under this decision the lessee could not cut timber other than for proper plantation uses, and if he could not cut for sale, then manifestly he could not recover from another person for the cutting of such timber. The statute (section 2931, Code of 1906; Hemingway's Code, section 5266) provides:

“Damages for Trespass.—If any person go or be upon any public land, and cut, fell, or otherwise injure any tree thereon, or commit any other trespass on such land, the damages for any such trespass shall not be assessed at less than the sum of two dollars . . . for each acre in every forty-acre subdivision of land upon which any trespass was committed by the defendant, besides the statutory damages prescribed for trespass committed as to any tree or timber thereon; and all such damages may be recovered in one and the same action, and the commissioner may institute suits for the recovery of any timber taken contrary to law; but this shall not apply to a person renting public land and having the license of the land commissioner to take trees or timber from contiguous woodland for fuel and the like.

See, also, section 2930, Code of 1906 (Hemingway's Code, section 5265); section 4700, Code of 1906 (Hemingway's Code, section 7510).

Under this section the authorized representatives of the public could not compromise a trespass of the kind

here without complying with the statute. It is manifest, if the true representative of the public could not compromise, that the lessee, as mere agent of the lessor, could not compromise and defeat the right of the land commissioner or other public authority to recover statutory damages prescribed under the statute on trespass. In *Moss Point Lumber Co. v. Harrison County*, 89 Miss. 448, 42 So. 290 and 873, this court held that a lease for ninety-nine years does not confer any rights in fee, and is governed by the law governing estates for years, and that, if any person being a tenant commits waste on such sixteenth section by cutting timber for commercial purposes, the state could recover from the tenant; that the extent of the tenant's right was to cut timber for the needs of his family and to clearing such land as a prudent owner would clear for agricultural purposes, leaving necessary timber for permanent use of the inheritance. There is nothing in the pleadings of the present case to show or intimate that the lessee expected even to clear the land for agricultural purposes, to say nothing of any actual clearing for that purpose. In this *Moss Point Lumber Co.* Case the court further held that a lessee of sixteenth section school land, in the absence of stipulations in the lease to the contrary, has leased the land only for agricultural purposes. In the case of *Jefferson Davis County v. James Simrall Lumber Co.*, 94 Miss. 530, 49 So. 611, it was held that cutting timber for commercial purposes from sixteenth section school lands is waste, notwithstanding a claim that it was cut for agricultural purposes, and that the jury were to be the judges of the good faith of the lessee in clearing sixteenth section school lands for cultivation. *Caston v. Pine Lumber Co.*, 110 Miss. 165, 69 So. 668, is cited for a justification of the majority holding in the present case and the case of *Lumber Co. v. Rowley*, 71 So. 3, which case is now relied on to justify this decision. In the *Caston* Case it was said that the right of a lessee to use timber is limited, but that a conveyance of the lessee's right was valid, and

would give the buyer the same right that the lessee had, but it was expressly recognized in that case that the lessee was not the owner of the timber growing on the sixteenth section. See, also, *State v. Fitzgerald*, 76 Miss. 502, 24 So. 872, holding that the land commissioner could maintain replevin for cross-ties cut on sixteenth section land.

These authorities, as well as statutes making it a crime to cut and remove timber from sixteenth section land, established conclusively, to my mind, the right of the owner of the fee to recover the value of the timber cut and taken from the premises. If the principles announced in the present decision are sound, then nonresident landowners and the public (not only including sixteenth section land, but all other public lands) will have to take some means of beating the lessee to the court in case of trespass, or they will be defrauded out of rights that they have in the matter. Landlords hereafter should be careful to see that their lease contract reads so as to extend only to cleared land; otherwise they will find that when they lease a plantation as such that the tenant will have the right to permit persons to cut timber or to sell the timber and pocket the proceeds. The history of litigation in this state shows that, so far as sixteenth section land is concerned, the lessees have frequently been employees of timber speculators and sawmill companies, and that they have frequently sold the timber to such sawmill companies or timber buyers, and all (under this decision) that it would be necessary to do to square the deal and enable the parties to the wrongful transaction to divide the "swag" is for the buyer of the timber to go upon the land and cut it, and then enter into a compromise with the lessee and thus be relieved of all liability to the state or to the authorities representing the state, because, under this opinion, the timber cutter, no matter whether he is a willful trespasser or not, can compromise with the lessee (who is frequently a hireling) for a nominal sum, and bind the public forever thereby. It

does not appear in the present case how much timber had been cut by Lewis, nor what the reasonable value of it was, nor what the statutory damages would be, but an unnamed amount of timber has been taken and compromised by a check for sixty-five dollars. I have been unable to find any authority that holds that a tenant in his own right can recover for property which does not in any sense belong to him, and the substance of the plea in this case is that all the timber to which the tenant had any right remained upon the land in question, and that the title to the timber cut and taken was vested in the public in trust for the school fund. Instead of the children of the township getting the benefit of this timber for the purposes of education, to which they were clearly entitled under the law, the lessee and his assignee reap the fruits thereof and secure the approval of the highest court of the state.

It would be interesting if time permitted to go into the history of the criminal neglect and waste of this princely patrimony, generously donated to the school children forever by the state of Georgia in ceding this territory to the United States. To begin with, parties charged with leasing the estates represented by these sixteenth section lands have leased them for long periods of time at a mere nominal sum, and the lessee securing this lease as a shadow of title or claim to protect him has entered into relations with timber grabbers and speculators calculated to make the judicious grieve and the righteous mourn, but have often been able to secure legal approval. Many of these sections are so situated as to be of but small or nominal value for agricultural purposes without large expenditures in draining and tiling, and are chiefly valuable for the timber; and the timber, through the manipulations of these vampires of infancy, these child robbers, has been taken for a mere nominal sum, diverted from its proper use, and the sections converted into a worthless waste fit only for the habitation of Peter Rabbit, Molly Hare, and the Goat family.

116 Miss.]

Opinion of the court.

I think the cause should be reversed and remanded to the lower court, with directions to have the board of supervisors or some other public authority brought into court to represent the rights of the public in this transaction.

---

SHRADER v. JOHNSON.

[77 South. 301, Division B.]

**EXECUTORS AND ADMINISTRATORS. Appointment and removal. Discretion.**

Where a party claiming to be the widow of deceased had been appointed administratrix of his estate, and afterwards another party claiming to be his only true and lawful widow petitioned for the removal of the first party and the appointment of herself as administratrix, it was proper for the court, in its discretion pending the settlement between the rival claimants, to remove the administratrix first appointed and appoint a third party administrator of the estate.

APPEAL from the chancery court of Sunflower county.  
HON. E. N. THOMAS, Chancellor.

Emma Shrader was removed as administratrix and J. W. Johnson appointed administrator, and Shrader appeals.

The facts are fully stated in the opinion of the court.

*J. B. Harris* and *Somerville & Somerville*, for appellant.

*S. F. Davis*, for appellee.

Cook, P. J., delivered the opinion of the court.

On the 30th day of June, 1915, R. M. Shrader died intestate. On July 10th of the same year one Emma Shrad-



er, claiming that she was the widow of the deceased, and his sole heir, filed her petition with the clerk of the chancery court asking that she be appointed as administratrix of the estate of the deceased. The prayer of the petition was sustained, and Emma was duly installed as administratrix. September 22d of the same year another woman filed her petition in the chancery court alleging that she was the sole and only widow of the deceased, and that his marriage to Emma was a pretended marriage, and she therefore prayed that Emma be removed as administratrix, and that she ("Addie") be installed in her stead. So it appeared that there were two claimants of the honor and profit which might accrue from being the widow of the deceased. Testimony was taken upon the issue thus presented, and the learned chancellor decided that the last-named claimant was the sole and only widow of the deceased.

Among the witnesses examined upon this issue was "Addie." "Emma" objected to her testimony upon the ground that her testimony was to establish her own claim against the estate of a deceased person "which originated during the lifetime of such deceased person." Section 1917, Code 1906. The chancellor overruled this objection, upon the theory that the claim did not originate during the lifetime of the deceased, relying upon the decision of this court in *Covington v. Frank*, 77 Miss. 606, 27 So. 1000. It seems to us that this question was not necessarily involved in the issue presented to the chancellor.

It appeared that the deceased was married to "Addie" some years before he is said to have married "Emma," and that he had never been divorced from "Addie." This was proven by several witnesses other than "Addie." So it was that it appeared that the deceased was claiming just one more wife than the law permitted him to enjoy. But the question as to who was the true wife might have been pretermitted to a final show-down when the claims against this estate would be the sole question for decision.

As we interpret this record, the chancellor was merely exercising his discretion about the removing of an administratrix, and we entirely approve his solution of the problem. He removed "Emma," but he refused to appoint "Addie." He appointed the clerk of his court to take charge of the estate to preserve the same pending the determination of the claims of the rival claimants to widowhood. We prefer not to express an opinion as to whether Addie was a competent witness to establish her marriage to the deceased at this stage of the game, as we believe that the chancellor properly removed "Emma," properly refused to install "Addie," and correctly appointed the clerk of his court.

The conclusion we have reached we think disposes of all of the other assignments of error, for the reason before stated that the chancellor was entirely right in clearing the deck, preserving the estate, for the final showdown.

*Affirmed.*

---

DIBERT v. DURHAM.

\* [77 South. 311, Division B.]

1. JUDGMENT. *Equitable Relief. Grounds. Defense not interposed.*

Where a corporation leased turpentine lands for two turpentine seasons; the lease providing that the lessee defendant should be reimbursed at a fixed rate per cup for any land included in the contract of which the lessor might deprive him of possession and the lessor corporation assigned the rent notes to its secretary and general manager, who was the owner of practically all of the capital stock of the lessor corporation and these notes on his death passed to his wife, who recovered judgment thereon. In such case since any breach of the lessor's agreement entitling the lessee to reimbursement occurred before judgment on the notes such judgment was conclusive, and execution thereon could not be enjoined, there being no evidence of fraud, accident or mistakes.

**2. SAME.**

In such case since the agreement for reimbursement was by the corporation, and not by the secretary and general manager, the lessee though deprived of turpentine privileges on a part of the lands, had no cause of action against the widow of the secretary, for the only cause of action which could have been asserted against the manager if living was one sounding in tort, based on trespass and no such action was maintained against him in his lifetime or against his estate after his death.

**3. EXECUTION. Injunction. Grounds.**

In such case where there was no fraud, accident or mistake in the execution of the written lease and no showing that the turpentine privileges were not worth the consideration agreed to be paid, the execution on a judgment on the rent notes in favor of the transferee will not be enjoined, because the lessee had a right of action for damages against the lessor, neither the lessor nor transferee being insolvent.

APPEAL from the chancery court of Pearl River county.  
HON. D. M. RUSSEL, chancellor.

Bill by D. D. Durham against Mrs. Eva C. Butterworth Dibert. From a decree overruling demurrers to the bill, defendant appeals.

Appellee was complainant in the court below, and appellant, Mrs. Dibert, a nonresident of Mississippi and a resident of New Orleans, La., was the real defendant in interest. The bill seeks to enjoin an execution of a judgment held by Mrs. Dibert against appellee in the sum of approximately three thousand six hundred dollars. A temporary injunction was granted, and the nonresident defendant appeared and filed a general demurrer to the bill. The demurrer was overruled, and an appeal granted to settle the law of the case. The bill charges that appellee leased some pine timber for turpentine purposes from the White Cedar Pile & Pole Company, a corporation of Louisiana; that this nonresident corporation acted by and through its secretary and general manager, John Dibert, the husband of the defendant, Mrs. Eva C. Dibert; that John Dibert was the owner of practically all, if not all, of the capital stock

of the corporation; that the consideration for the turpentine lease was evidenced and paid by certain promissory notes executed by appellee, Durham, to his own order, one note for one thousand dollars due sixty days after February 17, 1912, its true date, the other for three thousand dollars, payable October 15, 1913, both bearing interest at six per cent. interest per annum; that after the execution and delivery of the said notes they became the individual property of John Dibert; and that John Dibert died leaving appellant, his widow, as his sole heir at law and as the sole owner of said notes. The contract between Durham and the White Cedar Pile & Pole Company, Limited, is evidenced by writing made an exhibit to the bill. It was executed February 17, 1912, in the city of New Orleans, and the notes given for the consideration were likewise dated and executed at New Orleans, La., and made payable in that state. The contract for the corporation was signed by John Dibert as secretary, and his authority to execute the lease is not questioned. The contract describes the timber leased, and contains certain provisions or alleged warranties upon which the complainant in this suit bases a claim for damages. It is provided that Durham shall have the turpentine privileges of section 8, township 3 south, range 16 west, for two turpentine seasons from the date of the contract, and that, if the lessor or any one at its instance entered upon said section for the purpose of cutting the timber thereon, only one forty acres at a time shall be cut, and that no entry shall be made upon any other portion of section 8 until said forty acres are entirely cut; that, if "any person having the right to cut the timber" enters upon the land for the purpose of cutting the said timber, he shall do so "under the restrictions above set forth, and when necessary or such person to enter upon said land under said restrictions, D. D. Durham shall receive three and one-half cents per cup for all cups that he shall be deprived of in the use of section 8 during two turpentine

seasons from the date of this act." There is a similar provision in reference to section 17 upon which Durham is given the turpentine privileges for three years with the guaranty that, if the lessor enters upon section 17 for the purpose of cutting timber, he shall do so "after the close of the second turpentine season," and if an entry is made prior to the close of the second turpentine season, "they shall reimburse D. D. Durham at the rate of two cents per cup for such land in section 17 of which he may be deprived of the use of." The total consideration of five thousand dollars was one thousand dollars cash and the balance by the two promissory notes mentioned. The bill and exhibits show that John Dibert died some time in the years 1912, and that a judgment by division D, civil district court of New Orleans, rendered July 12, 1912, by Porter Parker, Judge, placed "Mrs. Eva C. Butterworth, widow of John Dibert," in possession as sole owner of all the property and effects, movable and immovable, of John Dibert, deceased, including the notes given for said turpentine lease. After the rendition of this decree, and on November 19, 1912, Mrs. Dibert, as the sole owner of said notes, exhibited her bill in the chancery court of Pearl River county to recover a judgment upon the notes and to enforce a vendor's lien upon the turpentine lease and rights granted the defendant, Durham. To this bill of complaint Durham made no defense, and a decree *pro confesso* and final decree based thereon were taken against the defendant. After the filing of this bill by Mrs. Dibert, Durham paid one thousand dollars, the amount of the first note, and entered into some kind of an arrangement with the complainant whereby he executed a bond in lieu of a receiver and was permitted to proceed with the working of his turpentine orchards and to remove the products. The condition of this bond was that, if the court should adjudge the defendant indebted to Mrs. Dibert upon the second note for three thousand

dollars, Durham would then pay the said note, with interest and costs. The final decree adjudged the defendant indebted to Mrs. Dibert in the full sum of the three thousand dollar note, and from this final decree Durham appealed to the supreme court. The present bill exhibited by appellee, Durham, refers to this original suit No. 681 in the lower court, No. 17718 in the supreme court, affirmed in 70 So. 839, and incorporates the pleadings and exhibits of the first suit as a part of the original bill for writ of injunction in the present suit. After cause No. 681 was affirmed by the supreme court, mandate was issued and an execution thereon was issued and placed in the hands of the sheriff of Pearl River county, who was proceeding to levy upon the property of the defendant, Durham, and his sureties when the present bill for injunction was filed. The only defendants to the present suit are the sheriff of Pearl River county and Mrs. Eva C. Butterworth Dibert, appellant herein. The bill here under review charges that the lessor, White Cedar Pile & Pole Company, entered upon the timber leased to appellee before the termination of his lease, and destroyed many of the boxes, and wrongfully took away from appellee his turpentine rights and privileges, and that this was done under the direction of John Dibert. The prayer of the bill is that execution of the final decree held by Mrs. Dibert against appellee be enjoined and stayed, that the court award damages for breach of the covenants contained in the written lease, and that the amount of these damages be offset against the consideration for the lease as evidenced by said notes and the judgment sought to be enjoined. There are various grounds of demurrer, a detailed statement of which is unnecessary.

*J. M. Shivers*, for appellant.

*Hannah & Foote*, for appellee.

STEVENS, J., delivered the opinion of the court.

(After stating the facts as above.) The bill in this case cannot be maintained. No assault is made upon the final decree recovered by Mrs. Dibert against appellee in the chancery court of Pearl River county and duly affirmed by the supreme court *Durham v. Dibert*, 70 So. 839. By the terms of that decree appellant was permitted to recover upon the last note of three thousand dollars and this decree operates as a monetary judgment, and its integrity cannot now be questioned. This final decree in the first suit adjudicated liability to Mrs. Dibert in the sum shown by the execution sought to be enjoined. There is here no showing of fraud, accident, or mistake in the rendition of the judgment here attempted to be enjoined. Relief against the judgment itself is really not prayed for. The bill of complaint admits, and is bound to admit, liability for the full amount of the judgment rendered in the former suit, but the payment of this judgment is asked to be delayed until appellee as complainant litigates with and fixes liability against appellant upon his alleged cross-action for damages. This is an effort not only to delay the execution of a solemn judgment, but to satisfy this judgment by an unliquidated demand for damages. In the enforcement of his alleged claim for damages growing out of the breach of the written lease, complainant has not been diligent, and the bill would appear to come within the ruling of this court in *Gum Carbo Co. v. New Orleans German Gazette*, 90 Miss. 177, 43 So. 82. Whatever claim appellee has now he possessed when Mrs. Dibert filed her suit against him. There is no charge of fraud in the transfer or assignment of the notes. It is affirmatively shown that appellant is the rightful owner of the three thousand dollar note and her right to collect upon this note has never been challenged. See *Smedes v. Ilsley*, 68 Miss. 590, 10 So. 75.

But there is a still further and perhaps a more fatal objection to the bill. No contractual relationship exists between complainant and Mrs. Dibert or her deceased

husband, John Dibert. John Dibert is not the lessor of the turpentine privileges, and is not a party to the covenants contained in the written lease. There is room for the contention that the lease contemplated the cutting of the timber by the lessor, its agents or assignees, and, with this in view, that the lease provided for liquidated damages. The bill in fact sues to recover the three and one-half cents per cup for each cup alleged to have been destroyed on section 8, and two cents per cup for each cup alleged to have been destroyed on section 17, and in addition thereto claims other damages. But the obligation to pay the agreed value per cup was the obligation of the White Cedar Pile & Pole Company, a corporation, and was and is in no sense the obligation of John Dibert, the manager or agent of the corporation. The only possible recovery against John Dibert, if he were living, would be founded in tort, based upon trespass properly alleged. No action of this kind was filed against John Dibert in his lifetime, and no liability of this kind has been fixed against his personal representative or his estate. In our judgment, then, the bill does not state a case against Mrs. Dibert, the widow. This aside from the contention that appellee could not have the enforcement of the judgment stayed until his damages were fixed and properly adjudicated by the court. There is no charge that either the corporation or Mrs. Dibert is insolvent. There was no fraud, accident, or mistake in the execution of the written lease, and no showing that the turpentine privileges were not worth the consideration agreed to be paid. More than this, the notes sued on in the first suit were executed by appellee payable to his own order, dated and made payable in Louisiana, and never came within the terms of our anti-commercial statute.

In our judgment, the bill of complaint does not state a case. The decree of the learned chancellor will be reversed, the demurrer sustained, and the cause remanded.

*Reversed, demurrer sustained, and cause remanded.*



## THIBODEAUX v. HAVENS.

[77 South. 313, Division B.]

1. TAXATION. *Tax sale. Validity.*

Whenever there is a legal bidder at a tax sale the collector must make title to him and in that case any sale to the state is void, the bidder would have a right to the deed and the collector could not deny or limit that right by a conveyance to the state.

2. TAXATION. *Tax sales. Presumptions.*

The statutory presumption that a tax deed to an individual conveyed a perfect title, except for certain defenses, is not overcome by the fact that the land was also sold to the state at the same time, since the deed to the individual purchaser conclusively established that there was a bidder, that the money was paid to the collector and the deed executed and it necessarily follows that the deed to the state in such case was a nullity.

3. TAXATION. *Tax deed. Presumptions.*

Where a tax deed recites a legal sale in the absence of proof to the contrary, it will be presumed that the deed recites the facts.

APPEAL from the chancery court of Jackson county.

HON. C. H. WOOD, Special Chancellor.

Bill by Mary F. Havens against W. E. Thibodeaux.

From a decree for the complainant, defendant appeals.

The facts are fully stated in the opinion of the court.

*Denny & Heidelberg*, for appellant.

In the case of *Bell v. Gordon*, 55 Miss. 45, the court says: "A tax deed raises the presumption that all was done which the law required to be done and that the land was sold in the smallest legal subdivisions." The court has since, in the case of *Green v. Williams*, 58 Miss. 759, and *Wheeler & Wilson Manufacturing Co. v. Ligon*, 62 Miss. 564, re-affirmed this doctrine announced above and, in our opinion, then, there can be no question as to everything being legal up to the time of the execution of this deed.

As to the sale of said lands to the state of Mississippi it seems to us that about the same contention is made as to that sale being illegal as there is to the sale to Delmas being illegal. Certainly there is nothing in this record that would suggest any illegality as to either sale except the fact of the supposed double sale. As to that particular feature we submit that there can be no contention under the pleadings and the evidence in this case that the taxes were not due and owing, as we have attempted to show to the court, above the sale of said land was essential because the taxes were not paid.

Under the allegations of the bill and amended bill and under the proof, this record presents the situation to our minds not unique, but one in which property condemned for taxes, and there is no contention contrary to this, that this land was either sold to the individual or to the state, and one sale or the other must have been good, and since the appellant is now vested with the chain of title created by this non-payment of taxes, it seems to us that, until the appellee can show to the court, by some sort of evidence, something in connection with the sales and make this void, she should not be allowed to come into court, and, by the mere proof that there was a mistake made by the tax-collector in the preparation of the records concerning the alleged tax sale, and the appellee not show or prove that which she avers of the two sales was good in law and fact. That because of the mistake in the record as to the other attempted sale, especially in the light of the Law of 1878, which says: "All conveyances hereinafter provided shall vest in the purchaser or the state, as the case may be, a perfect title to the land sold for taxes and no such conveyance or list as between the original parties, or subsequent alienees, shall be invalidated, nor shall any defense offered against the title thus conveyed be good in any court in this state, except by proof that the taxes for which said land was sold had been paid or tendered to the proper officer before sale, or that the taxes were

illegal in part, and that before the sale the tax payer tendered to the proper officers the amount of legal taxes due on said land.”

The first Monday of March, 1880, was the time and J. R. E. Clark was the tax-collector. Under the pleadings, the taxes were due and owing upon the lands involved herein. All the necessary record steps going to make up the title secured by Delmas are regular and legal, the same is true of the record showing that the title went to the state of Mississippi. Here are two silent witnesses that show that the taxes were not paid.

The appellee by her pleadings and by the lack of evidence to the contrary show the same thing. Both tax sales, of course to the contrary show the same thing. Both tax sales, of course, could not be good because the land could not be sold both to the state and to Delmas, and Delmas or the state of Mississippi, one or the other, did get a tax title, but which of the two the land was sold to first, the attempted sale to the other would not be good.

Appellant is now vested with both of these, one or the other certainly vested in him title. As to which one we are not concerned, and it is not for us to say which title one or the other must stand.

*White & Ford*, for appellee.

It would be difficult to conceive, we submit, of a tax sale, more palpably void and unlawful than this. It is admitted and the record shows beyond question that the tax collector sold the same piece of land to an individual and to the state on the same date. We contend that both of these sales were void. Appellant contends that probably one of them was void, but inasmuch as he holds the beneficial interest of both of them the court cannot say that both were void, and therefore he has title. That is the gist of the argument.

We shall deal with the sale of the land to the state first. At the time these tax sales were made, the Laws of 1878 were in effect. This legislation appears at pages 23 to 83 of the published Laws of 1878. Section 40 appearing at page 45, provides: "That if upon offering all the land of any delinquent tax-payer, no person will bid for it, the whole amount of taxes and all costs, the tax collector shall strike off the same to the state." It is manifest that it was the duty of the tax collector first to get the bids of individuals, and if no one bid for it the amount of taxes, then the land should be struck off to the state. We insist, therefore, that the tax collector had no right to sell the land to the state except where there was no bidders at all, or where no one bid the amount of taxes. This proposition is so manifestly correct, we think that no citation of authority is necessary to support it. We know, as a matter of fact from what the record shows, that the tax-collector did receive a bid sufficient to pay the amount of the taxes on the land for the reason that he actually sold the land to Chas. H. Delmas to whom he executed the deed of conveyance shown at pages 14 to 16 of the record. Clearly therefore, having sold the land to an individual, he could not lawfully sell it thereafter to the state. Hence, we submit that the tax sale to the state was absolutely void and appellant can claim no title from that source.

We come now to the sale to the individual. The act of 1878 directed very clearly the manner in which the lands should be sold. Section 30 of the act provides: "on the first Monday of March if the taxes shall remain unpaid and no sufficient personal property can be found on which to levy the same, the collector shall proceed to sell the said land, or so much and such parts of the land of each delinquent tax-payer as will pay the amount of taxes due by him and all costs and charges to the highest bidder for cash. He shall offer first the smallest legal sub-division which is hereby declared to be forty acres, and if the first parcel so offered does not produce the

amount due, then he shall add another similar subdivision and so on until the requisite amount is produced."

We contend that the tax collector's deed shows on its face that the officer selling the land did not follow or undertake to follow the provisions of this statute. The deed purports to follow the form provided by the statute, and contains a description of thirty-six hundred and twenty acres which he certifies that he sold to Chas. H. Delmas for the lump sum of twenty-one dollars and forty-nine cents, being the taxes due on said land. It is utterly impossible to tell from that paper what was the taxes due on each particular tract or for what part of the total purchase price each tract sold. No testimony was taken as to the manner in which the sale was conducted, and the tax collector's deed introduced into evidence is the only proof on the manner in which the sale was made. As pointed out in the statement of facts in this brief, the land was assessed in thirty-six different parcels as shown by pages 61 to 84 of this record. Appellant offered no proof that the sale was valid other than the tax collector's deed, and he must stand or fall by that. The deed recites in effect that the foregoing land, namely, thirty-six hundred and twenty acres were sold to Chas. H. Delmas for twenty-one dollars and forty-nine cents. We can only conclude from that statement that the entire body of land brought the amount named. It is of course impossible to say from the deed that he sold the several tracts separately and realized different amounts from them respectively. Fortunately, we do not have to speculate as to what the Mississippi supreme court would hold in a case of this character, for the reason that it has decided the precise question already. See case of *Morris v. Myer*, reported in 87 Miss. 701.

The case now at bar is as near like that recited by the supreme court as one could imagine, and we think must control here. *Higdon v. Salter*, reported in 76 Miss. 766.

These two decisions, we submit, are precisely decisive of the proposition involved in this case.

Counsel for appellant seems to rely on the statutory presumption of a tax deed that all was done that the law required to be done. He cites the case of *Bell v. Gordon*, 55 Miss. 45; *Green v. Williams*, 58 Miss. 759, and *Wheeler v. Lignon*, 62 Miss. 564. It is true indeed that under certain conditions a tax deed executed in regular form raises the presumption that the tax collector complied with the provisions of the statute in making the sale. However, this presumption does not apply in the case of a tax deed which shows on its face that the tax collector did not comply with the law. None of the authorities cited by counsel on that point, we submit, are in point.

In the case of *Gregory v. Brogan*, 74 Miss. 694, the court held: "that a void sale is no sale and no conveyance can be supported by it, and the Code of 1880, section 525, will not bar a delinquent tax payer from setting up as a defense to the sale of his land a total departure from the provisions of the law governing and directing the assessment and sale of land for taxes." The court will observe that section 525 of the Code of 1880, is the same in effect as section 42, Laws of 1878, under which this sale was made.

The only question in this case is whether or not either or both of the tax sales made on the first day of March, 1880, were valid. We think it is manifest from the above that they were both void, and it follows that the claim of appellant against the forty-acre tract involved should have been cancelled and the title of appellee confirmed.

We submit that there is no error in the record, and that the case should be affirmed.

COOK, P. J., delivered the opinion of the court.

The appellee in this case exhibited her bill of complaint in the chancery court of Jackson county for the purpose of having certain deeds canceled as a cloud upon her

title to certain described lands, situated in said county. Omitting all save the facts essential to a proper determination of this appeal, it is only necessary to say that the defendant's claim of title to the lands in controversy depends upon the validity of a deed executed by the tax collector of Jackson county and a patent from the state to the same lands. It appears that in March, 1880, the lands in controversy were sold for the nonpayment of the taxes assessed against them both to the state of Mississippi and to an individual. The record shows that the lands were first struck off to the state, and then that they were struck off to an individual. By mesne conveyances defendant below became the purchaser of both titles, if any, resting on the tax sales.

The bill alleges that the deeds upon their face show that several hundreds of acres of land were offered and sold at one time, and that same were not offered in subdivisions of forty acres as required by law. As we construe the case made by this record, there are but two questions to decide. The complainant contended below, and contended here, that the deeds upon their face demonstrate that the lands were not first offered in forty-acre tracts, but that the several hundred acres of land were offered and sold *in solido* and for a lump sum. The further contention is made that, inasmuch as it appears from the list of lands struck off to the state that the lands were not sold to an individual, and inasmuch as the record shows that the same lands were sold to an individual, the first destroys the last and the last destroys the first. In other words, it is contended that the presumption of the validity of the sale arising from the execution of the deed itself does not obtain here, because, by the act of the tax collector, he has thrown such doubt or suspicion upon his official acts that no presumption can be indulged in at all; and upon the face of the record, in the absence of further proof, it affirmatively and necessarily follows, that no valid sale of the lands was made.

Does the fact that the record shows the land was struck off to the state overcome the legal presumptions afforded by the statute? We quote from the statute as follows:

"All conveyances as hereinafter provided shall vest in the purchaser or the state, as the case may be, a perfect title to the land sold for taxes and no such conveyance or list as between the original parties, or subsequent alienees, shall be invalidated, nor shall any defense offered against the title thus conveyed in any court in this state, except by proof that the taxes for which said land was sold had been paid or tendered to the proper officer before sale, or that the taxes were illegal in part, and that before the sale the taxpayer tendered to the proper officers the amount of legal taxes due on said land."

The deed to the purchaser in this case, we think, conclusively establishes that there was a bidder; that the money was paid to the collector and the deed executed. With this predicate, it necessarily follows that the deed to the state was a nullity.

Whenever there is a legal bidder the collector must make title to him, and in that case any sale to the state was void. The bidder would have a right to the deed, and the collector could not deny or limit that right by a conveyance to the state.

The sale to the individual, as proven by the collector's deed, being valid, and the deed to the state being invalid by the same evidence, we think the appellant was the owner of the land, unless it appears that the land was not offered for sale and sold in accordance with the terms of the statute. The deed recites a legal sale, and without proof to the contrary, it will be presumed that the deed recites the facts. There was no such proof, and we therefore hold that the chancellor erred. *Lewis v. Griffin*, 103 Miss. 578, 60 So. 651.

*Reversed and remanded.*



## ILLINOIS CENT. R. CO. v. MISSISSIPPI RAILROAD COMMISSION.

[77 South. 314, In Banc.]

1. CARRIERS. *Carriage of passengers without tickets. Excessive fares. Code 1906, Sections 4842-4843.*

Where the railroad commission, acting under authority given by Code 1906, sections 4842-4843, fixed a maximum rate that may be collected from passengers boarding trains at stations where tickets are on sale, carriers may yet require a higher rate from passengers not having secured tickets than from those who have, but cannot collect more than the maximum rate fixed by the commission.

2. CARRIERS. *Railroad commission. Reasonableness of order fixing fares. Code 1906, Section 4055.*

Code 1906, section 4055, making it unlawful for railroads to collect more than the regular fare from passengers who board trains at places where tickets are not offered for sale was not intended to control the railroad commission in fixing maximum rates, and an order by the commission, making the maximum ticket rate and the maximum train rate each at three cents a mile, is not unreasonable and void.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Suit by the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company against the Mississippi Railroad Commission. From decrees dismissing each bill, plaintiffs appeal.

The facts are fully stated in the opinion of the court.

*Chas. N. Burch, H. D. Minor, R. V. Fletcher and Mayes, Wells, May & Sanders*, for appellant.

*Ross A. Collins*, Attorney-General, and *Earl N. Floyd*, Assistant Attorney-General, for appellee.

STEVENS, J, delivered the opinion of the court.

Two cases are presented by the one record. Appellants, the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, each filed its bill of complaint against the Mississippi Railroad Commission to enjoin the enforcement of penalties for violation of an order of the Commission. In 1907 the Railroad Commission passed an order, prohibiting all railroads from charging passengers who boarded trains without tickets a fare in excess of three cents per mile. This order, it appears, was complied with by the carriers until about January 1, 1915, when appellants adopted a rule requiring each passenger who had an opportunity to buy a ticket and who had not provided a ticket to pay ten cents in excess of the regular fare of three cents per mile. In attempting to adopt this rule appellants filed with the Railroad Commission a new tariff, giving notice of its intention to charge the extra sum of ten cents and promulgating an order directing their passenger conductors to collect the excess rate in all proper cases. This tariff or rule of the company was not approved by the Commission, and, indeed, before it could be approved appellants had begun to enforce the rule. Upon hearing, the Commission declined to approve the extra charge of ten cents, and entered an order, directing that if the said charges were made after a given time the carriers would be fined five hundred dollars for each offense. In pursuance of this order of the Commission appellant Illinois Central Railroad Company was fined five hundred dollars and the bill seeks to restrain the collection of this fine and any other fines that might be imposed for the violation of the order in question. Appellant Yazoo & Mississippi Valley Railroad Company averred that it was the intention of the Commission to impose similar fines upon it, and seeks by its bill to enjoin the imposition and enforcement of all such fines. The manifest object of the bills is to test the right

of the Commission to impose these fines and to establish the right of the carriers to enforce what they term a ten-cent penalty. Their bills charge that this ten-cent penalty is not a part of the regular fare required of passengers, but is purely a penalty designed to enforce a regulation of the company, requiring passengers to provide themselves with tickets. The new tariff, under which the penalty is being collected, was filed December 30, 1914, effective January 1, 1915. It will be noted, then, that the carriers adopted their new tariff, and were enforcing the collection of this penalty without the express approval of the Commission. The Commission had, in December, 1902, fixed the maximum ticket rate at three cents per mile and the maximum train rate at four cents per mile. In February, 1907, the following order was passed:

"It is ordered, that the former order of this Commission, authorizing railroad companies operating within this state to collect through their conductors a rate of four cents per mile from passengers boarding trains at stations where tickets are on sale, who had opportunity to purchase tickets and failed to do so, is hereby canceled, and that in lieu thereof a rate of three cents per mile shall be collected. It is further ordered, that the minimum amount to be collected from passengers shall be ten cents."

Upon the filing of the bills temporary injunctions were issued, general demurrers were thereafter filed by the attorney-general to the bills, and decrees entered by the trial court dismissing the bills. From these final decrees dismissing the bills, an appeal with *supersedeas* was allowed by the chancellor. It further appears from the bill of the Illinois Central Railroad Company that the passenger who was required to pay the ten-cent penalty on January 1, 1915, for which the five hundred dollar fine was imposed by the Commission, had an opportunity to buy a ticket before the passenger boarded the train.

It is the contention of appellants that the rule of the company imposing a ten-cent penalty on all passengers who have not purchased tickets, regardless of their destination or the length of their journey, is a reasonable regulation, and that the order of the Commission passed February 19, 1907, is unreasonable and void. There is a further contention that if the extra ten cents is to be regarded as a part of the regular fare and not a penalty, the complainant carriers complied with the statute providing how their tariffs shall be made and published, and that they had the right to alter this tariff subject to review by the Commission on proper hearing. The bills also aver that when the complainants were cited by the Commission to show cause why they should not be punished, the complainants appeared with their attorneys and witnesses, and offered to show by evidence that the collection of the extra ten cents was a reasonable charge and a reasonable regulation; that the Commission declined to hear proof because of the admitted fact that the carriers were then enforcing the new tariff or rule, and the Commission declined to go into the facts while the carriers were in default and were violating the orders of the Commission, the necessary inference or deduction being that the Commission required a declaration on the part of the carriers that they would refrain from collecting the ten-cent penalty until the Commission approved or authorized the same by a new order spread upon its minutes.

Under our statutes, especially sections 4842 and 4843, the Railroad Commission is empowered to fix and revise rates to be charged passengers. The power of the state, through the Commission as a governmental agency, to supervise common carriers and fix the maximum charges for the transportation of passengers and freight is conceded. The method of regulating carriers by and through administrative bodies acting as governmental agencies is now almost universally adopted in all the states and by the national government. "As the proc-

ess of arriving at reasonable rates is a perplexing one, involving the exercise both of judicial functions in determining whether a given rate is under the circumstances reasonable, and of legislative functions in fixing the rate after such determination, it was early recognized that legislative assemblies could not give to such questions the required time to investigate and determine in advance the reasonableness and justness of the proposed rate or other requirement, necessitating, as such a question would, long and protracted hearings and intricate knowledge of such matters. For this reason the plan was devised . . . of creating Commissions . . . and the delegation to such bodies of administrative and legislative powers." 4 R. C. L., par. 93. When the Commission acts within the powers expressly delegated, its orders, when reasonable, speak with as much authority as a statute. The bills under review show upon their face that the Commission has exercised its delegated power in fixing the maximum train rate at three cents per mile. Any intimation that the rate is unreasonable or confiscatory has no bearing upon the issues here. No facts are under review. The capital employed by the carriers, their expenses, experiences in charging three cents per mile, profits, etc., are not under review. The primary question is whether appellants may collect a sum in excess of a rate fixed by the Commission, whether this excess be regarded as a penalty or as additional compensation for the inconvenience to which carriers are put in collecting fares on trains.

It may be conceded that under the common law carriers may adopt reasonable rules and regulations and indeed that appellants could adopt reasonable regulations to prevent passengers from boarding passenger trains without first providing themselves with tickets; but in doing this, "the car rate can in no case exceed the maximum allowed the company by its charter or a statute fixing rates" (25 Am. & Eng. Encl. of L. [2d Ed.] 1104), or by the order of the Commission acting

within the scope of its delegated authority. As well stated by Elliott on Railroads, vol. 4, par. 1603:

"The company may enact and enforce a rule or regulation requiring a reasonably higher rate of fare to be paid upon the train than the ticket rate, . . . but it cannot be fixed at such a sum that the fare collected on the train will exceed the maximum rate allowed by law."

"A rule of the carrier which requires that, when cash fare is paid, an extra amount shall be collected above the regular fare is not valid when the cash fare, together with the extra amount, exceed the maximum rate allowed by law." Footnote 28, section 1033, vol. 2, Hutchinson on Carriers (3d Ed.), and authorities there cited.

In *Zaglemyer v. Cincinnati, etc., R. R. Co.*, 102 Mich. 214, 60 N. W. 436, 47 Am. St. Rep. 514, it was held:

"That the company cannot impose, as a penalty for not purchasing a ticket, such a sum that the fare collected on the train, including such additional amount, shall exceed the maximum allowed by law"—citing *Railroad Co. v. Skillman*, 39 Ohio St. 444; *Chase v. N. Y. Central R. R. Co.*, 26 N. Y. 523.

The case quoted from was decided in 1894 and is one of the leading cases on the subject. The same result is reached, and the infliction of a penalty for violating the law was upheld, in *Hogan v. Long Island R. R. Co.*, 142 App. Div. 29, 126 N. Y. Supp. 449. The authorities indicate that this is the holding of practically all courts and commentators. The supreme court of Arkansas upheld a statute in terms very similar to the order of our Commission. *St. Louis & S. F. R. Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. 971.

It is insisted that the Commission has approved a maximum ticket rate of three cents per mile, and therefore the order fixing the maximum train rate at three cents per mile is upon its face unreasonable and void. We cannot yield to this suggestion. Our statutes devolve a delicate responsibility upon the Commission, and the decisions of such a tribunal should have the sympathetic

regard of the courts. The orders of the Commission under review should not be stricken down unless they are clearly unreasonable or void. *Minn. St. P. & S. St. M. R. Co. v. Railroad Commission*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821; *Chicago, R. I. & P. R. R. Co., v. Nebraska Railroad Commission*, 85 Neb. 818, 124 N. W. 477, 26 L. R. A. (N. S.) 444; *I. C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 27 Sup. Ct. 700, 51 L. Ed. 1128.

It is further contended that section 4055, Code of 1906, making it unlawful for a railroad company to collect more than the regular fare from a passenger who boards a train at a place at which the company does not offer tickets for sale shows the policy of our state to authorize a discrimination between ticket and train rates. When this statute was enacted there was no order of the Commission fixing the maximum train fare at three cents per mile, but on the contrary, the order of the Commission passed in 1902 authorized a four-cent train rate. The statute relied on does not authorize the carrier to charge any specified rate, and was not designed to control the Commission in the exercise of its power to fix a maximum charge per mile to be paid by passengers boarding the train without tickets. The railroad companies are at liberty to lower their ticket rates in such way as to discriminate between ticket and train rates without violating the maximum prescribed by the Commission. The right or power of the carriers to discriminate between the ticket and train rates when the maximum charge does not exceed the maximum fixed by the Commission is not involved in the present cases. We are also not concerned in the inquiry whether the ten-cent charge is a penalty or additional compensation. If a fare, it exceeds the lawful; if a penalty, its collection operates to require of passengers money in excess of the maximum train rate. Indeed railroad companies are not chartered for the purpose of inflicting penalties, but to do service for a patronizing public in return for a fair and reasonable

compensation. No decision of our court is in conflict with the views herein expressed. On the contrary, the proper limitation is indicated by our court in *Forsee v. A. G. S. R. R. Co.*, 63 Miss. 66, 56 Am. Rep. 801, as follows:

"It is competent for a railroad corporation to adopt reasonable rules for the conduct of its business, and to determine and fix, within the limits specified in its charter and existing laws, the fare to be paid by passengers transported on its trains."

This decision of our court was rendered before the creation of our Railroad Commission and prior to the adoption of the modern method of supervising carriers and their charges through a commission.

It follows that the demurrers to the bills were properly sustained, and the decrees appealed from must be affirmed.

*Affirmed.*

---

SAWMILL CONST. CO. v. BRIGHT  
BRIGHT v. FINKBINE LUMBER CO.

[77 South. 316.]

1. *TORTS. Joint and several liability.*

It is settled in this state that tort-feasors may be sued jointly and severally, and that one joint tort-feasor is not released from liability by suit or judgment against the others, but that it requires a satisfaction or payment to satisfy the liability against joint tort-feasors.

2. *MASTER AND SERVANT. Relation. Performing service for another.*

A person who is in the general employment of one person may be temporarily in the service of another with respect to a particular transaction or piece of work, so that the relation of master and servant arises between them as where an employer



---

Brief for appellant.

[116 Miss.]

lends his employee to a third person for a particular employment, the employee for any thing done in the particular employment, is the employee of the third person, though he remains the general employee of the employer.

3. MASTER AND SERVANT. *Relation. Question for jury.*

Whether or not plaintiff who was employed and paid by one party, but was injured while cranking an engine at the request of a foreman of another party was at the time of the accident the servant of the other party was a question for the jury.

APPEAL from the circuit court of Simpson county.

HON. W. H. HUGHES, Judge.

Suit by Robert Bright, a minor, by next friend, against the Sawmill Construction Company and the Finkbine Lumber Company. From a judgment against the first named defendant only, both plaintiff and that defendant appeal.

The facts are fully stated in the opinion of the court.

*A. W. Dent and Hirsh, Dent & Landau, for appellant.*

The appellant's evidence shows that he was working under the orders of both the Sawmill Construction Company and the Finkbine Lumber Company; that he and the other employees of the Sawmill Construction Company were required to do this. At the time appellant was injured, he was attempting to crank a machine which was being used by the Finkbine Lumber Company as a part of the common purpose to complete the construction of the mill. The strips to be cut by machine at the time was to be run by Tennison and another employee of the Finkbine Lumber Company. Bright, therefore, in pursuance of instructions, and in carrying out the common purpose of both the Sawmill Construction Company and the Finkbine Lumber Company, was at said machine undertaking to crank it. We submit, therefore, that at the time appellant was injured the relation of master and servant existed between him, not only as to the Sawmill Construction Company, but as to the Finkbine Lumber

Company, and that as the machine was in a broken down, defective, and dangerous condition at the time Tunnison, the foreman of the Finkbine Lumber Company, ordered him to crank it, and that in obeying said orders he was injured as a result of said dangerous and defective condition, then the Finkbine Lumber Company is liable, and it was error for the lower court to give said Finkbine Lumber Company the affirmative charge. The mere fact that Bright was employed and paid by the Sawmill Construction Company is not decisive of the question presented here. The master, we submit, is the person in whose work he is engaged, and who has a right to direct and control the action of the servant.

"The payment of an employee by the day, or the control and supervision of the work by the employer, though important considerations, are not in themselves decisive of the fact that the two are master and servant. Servants who are employed and paid by one person may nevertheless be, *ad hoc*, the servants of another in a particular transaction, and that, too, even where their general employer is interested in the work. Obviously they may desert the service of their lawful master and work for another; or he may lend their services to another person, abandoning to the latter all control over them; or they may, without consulting their master, but in good faith, assist a person independently employed to do something which will benefit their master, but with which neither he nor they have any right to interfere, and in which they act entirely under the control of such other person." Sherman & Redfield on the Law of Negligence (5 Ed.), secs. 160, 161.

It must be apparent to this court from the facts stated, that both the Sawmill Construction Company and the Finkbine Lumber Company, were under a duty to furnish Bright a reasonably safe machine to crank, with a reasonably safe crank with which to crank said machine, and if they, or either of them failed to do so while he

was working for them, then the one ordering him to do the work would surely be liable.

"That, although the servant was in the general employment of the contractor, he had, as a result of some arrangement between his master and the principal employer, become the special servant of the latter for the purpose of the work in hand at the time when the injury in suit was received.

"That by virtue of the original agreement between the principal employer and the contractor, the former acquired the right of giving directions to the servants of the latter with regard to the manner in which the work was to be done. Manifestly, under such circumstances, the contractor is not, in the proper sense of the term, an "independent contractor," and according to the decided preponderance of authority both he and such person as he may engage for the work in hand are in law the servants of the principal employer who is responsible to a stranger for injuries caused by the negligence of a servant of the contractor; and to a servant of the contractor who grounds his claim upon the principal employer's nonperformance of one of those nondelegable duties which the law imposes on a master for the protection of his servants." *Johnson v. Lindsay* (1891), A. C. 371, 16 L. Q. B. (N. S.) 90; 65 L. T. (N. S.) 97; 40 Week Rep. 405; 55 J. P. 644; *Rourke v. White, Moss Colliery Co.* (L. R.), 2 C. P. Div. 205, 46, L. J. C. P. (N. S.) 283; 36 L. T. (N. S.) 49; 25 Week Rep. 263; *Delaware L. & W. R. Co. v. Hardy*, 59 N. J. 35, 34 Atl. 986; *Delory v. Blodgett*, 185 Mass. 126, 64 L. R. A. 114, 102 Am. St. Rep. 328, 69 N. E. 1078, 15 Am. Neg. Rep. 581; *Ellinghouse v. Ajax Live Stock Co.*, L. R. A. 1916D., p. 840.

We, therefore, submit that the court erred in granting the appellee the Finkbine Lumber Company the peremptory charge, to jury to find for it. Surely, under the facts stated, and under the evidence as detailed in the bill of exceptions, the appellant should have been per-

116 Miss.]

Brief for appellee.

mitted to submit his claim against the Finkbine Lumber Company to the jury. We respectfully submit that this cause should be reversed and remanded.

*W. B. Parker*, for appellee.

We contend that there was no liability on the part of Finkbine Lumber Company; that the declaration would not have supported a judgment against the Finkbine Lumber Company; that the demurrer of Finkbine Lumber Company on record pages 10 and 11 should have been sustained; and that the evidence shows conclusively that the appellant was employed by the Sawmill Construction Company, an independent contractor, and was under the direct supervision of its foreman, Mr. Dixon, who directed him on the day of the accident to do the very thing at which he claims to have been injured, the doing of which he claims caused the injury.

Appellant quotes Mr. Labatt in his treatise on Master and Servant, second edition, volume 1, section 40. We do not think the law applies for the reason that there was no proof whatever to show that there was an agreement between this appellee and the Sawmill Construction Company, the contractor whereby appellee secured the right of giving directions to the servants of the latter in regard to the manner in which this work was to be done.

It is our contention that the Sawmill Construction Company was the sole and only master of the appellant, had absolute control over him and his actions, and that at the time he was injured he was acting in the identical work which said Sawmill Construction Company had directed him to do and that it was on account of his instructions from said Sawmill Construction Company that he attempted to crank the gasoline engine and not on account of the request, or even the direction of Mr. Tunnison that he attempted to crank it. Mr. Tunnison merely advised him that he was ready for him to do the thing his master had instructed him to do.

In the case of *Ellinghouse v. Ajax Live Stock Company*, Lawyers Reports Annotated, 1916D., page 840, quoting from Wood, Master and Servant, paragraph 317, it is said:

“The real test by which to determine whether a person is acting as the servant of another is to ascertain whether at the time the injury was inflicted he was subject to such person’s orders and control and was liable to be discharged by him for disobedience of orders or misconduct.” See also 4 Thompson, Neg. 4996; 1 Shearm. & Redf., Neg. (5 Ed.), par. 225; *United States Board & Paper Co. v. Landers* (Ind. App.), 92 N. E. 203; *Union P. R. Co. v. Billeter*, 28 Neb. 422, N. W. 483; *Harris v. McNamara et al*, 12 So. 103.

Appellant relies upon the case of *Ellinghouse v. Ajax Live Stock Company*, L. R. A. 1916D., 840, to sustain his contention that at the time of the injury appellant was an employee of this appellee, the Finkbine Lumber Company, or to be more specific, appellant quotes from that decision merely a quotation of the court on page 840 to the effect that:

“The servant of one master may temporarily enter the service of another and for the time become the servant of the other; as when the servant is lent by his master to the other for the particular employment and becomes subject to the control of the other.”

We do not think the facts in the case at bar make out such a case for the reason that appellant was not lent to the Finkbine Lumber Company, but on the contrary was directed by his own superior officer to crank the engine in question.

In conclusion, we submit that the undisputed facts of this case show that the Sawmill Construction Company, an independent contractor, employed appellant, Bright, paid him his salary, and controlled him in the work to be done by him. On the day of the injury the Finkbine Lumber Company had borrowed the use of the gasoline engine in question it is true, but Mr. Dixon, the foreman of

Sawmill Construction Company, appellant's employer, specifically directed him that if the Finkbine Lumber Company wanted to use that specific engine, which operated the rip-saw, that he should then and there crank it. The Sawmill Construction Company did not loan this appellee, the Finkbine Lumber Company their servant, the appellant; it loaned this appellee its rip-saw, which was run by a gasoline engine, and directed this appellant, its servant, to crank it. Appellant did not owe Finkbine Lumber Company any duty to crank said engine. He owed the duty to crank said engine to his master, the Sawmill Construction Company whom he says directed him to crank said engine, and in accordance with whose instructions he did attempt to do so.

If appellant, at the time he was requested to crank said engine by Tunnison, had refused to do so, could it be said from this record that either Tunnison or this appellee could have discharged him?

We respectfully submit that the lower court in granting the peremptory instruction, having before it the testimony in full, as given by the witness, was correct, and that this case should be affirmed.

ETHERIDGE, J., delivered the opinion of the court.

Robert Bright, a minor, by next friend brought suit against the Sawmill Construction Company, a corporation under the laws of the state of Georgia, and the Finkbine Lumber Company, a corporation under the laws of the state of Iowa, alleging that the Finkbine Lumber Company was erecting a sawmill at D'Lo, in Simpson county, Miss., and that the Finkbine Lumber Company had contracted with the Sawmill Construction Company to do a portion of the work in erecting the sawmill; that the plaintiff was employed by the said defendants as a common laborer to mix or assist in mixing or making concrete used in the construction of the said mill; that while thus engaged the foreman of the defendants com-

manded the plaintiff to crank an engine commonly known as the rip saw engine a part of the machinery used in the said plant and in the construction thereof; that the plaintiff is not a machinist, and was ignorant of the dangers appertaining to said employment, and that he was ordered to crank the engine without being instructed as to the danger incident thereto; that the said engine was defective, and that by reason of said defect it back-fired and struck the plaintiff on the jaw, breaking his jaw and knocking out several teeth, because of which he suffered permanent injuries, great pain and distress, and incurred large expense. It is alleged that the defendants were negligent in directing the plaintiff to crank a defective machine which the defendants knew, or should have known, was defective and dangerous, and in not furnishing plaintiff a reasonably safe machine with which to do the work he was directed to do and in directing the plaintiff to change from the work at which he was engaged to a work which was highly dangerous without instructing him how to do this work and of the dangers incident thereto, and in not furnishing plaintiff with a good, safe machine, or in not keeping it in safe and suitable repair, and in furnishing plaintiff a dangerous machine run with a highly dangerous agency, to wit, gasoline, without giving plaintiff full instructions relative thereto, and in furnishing plaintiff with a defective machine in a dangerous condition so that the crank thereof would jerk, wobble, run away, backward and forward, and in ordering him to use the same without advising him of the defective condition and dangers incident thereto, and in placing the plaintiff under a grossly incompetent and negligent foreman.

The testimony of the plaintiff showed that he was employed by the Sawmill Construction Company, and was paid by that company, but that it was the practice of the Sawmill Construction Company and the Finkbine Lumber Company to work their respective employees in common and to exchange the services of the employees when-

ever either thought proper to do so. In other words, that the Finkbine Lumber Company had a right to use the services of plaintiff in any of its operations in the construction of the sawmill, and that the Finkbine Company's foreman, Tunnison, directed plaintiff to crank the machine in question without informing him of its dangerous condition; that the dangerous condition was known to the said foreman, and that in cranking, or attempting to crank, the said engine, on account of the defects known to the Finkbine Lumber Company, it back-fired and ran away and struck plaintiff on the jaw. He testifies that he was directed by the foreman of the Sawmill Construction Company to perform any labor for the employers of the Finkbine Lumber Company that he was called upon to do by its foreman, and that it was customary under the arrangement between the two companies for the employees of the Sawmill Construction Company to work under the direction of the foreman of the Finkbine Lumber Company.

Other witnesses for the plaintiff corroborated his statement as to the defective condition of the machine and as to the custom of the Finkbine Lumber Company to use the employees of the Sawmill Construction Company whenever they deemed proper, and that acting under instructions of the foreman of the company, who had knowledge of the defects of the engine, plaintiff was injured while attempting to crank the machine without having knowledge of the defects existing in the machine. This testimony of plaintiff and his witnesses was contradicted by the foreman of the Sawmill Construction Company and by the foreman of the Finkbine Lumber Company. The Sawmill Construction Company and the Finkbine Lumber Company were sued jointly in tort, and at the conclusion of the evidence the court granted a peremptory instruction for the Finkbine Lumber Company, but submitted the case between the plaintiff and the Sawmill Construction Company to a jury, and the jury found a verdict for the plaintiff against the Sawmill Construc-



tion Company, which company, since the rendition of said judgment, has become bankrupt and the judgment rendered against it worthless to the plaintiff.

We see no error in the submission of the case on the part of the Sawmill Construction Company; but we think it was error for the court to grant the peremptory instruction on behalf of the Finkbine Lumber Company. That company contested liability upon two theories, one of which was that the suit was a joint suit and there was no proof of joint liability; and the other was that the plaintiff was not an employee of the Finkbine Lumber Company but was a mere volunteer in performing the services for the Finkbine Lumber Company, and the relation of master and servant did not exist. It is settled in this state that tort-feasors may be sued jointly and severally, and that one joint tort-feasor is not released from liability by suit or judgment against the other, but that it requires a satisfaction or payment to satisfy the liability against joint tort-feasors. *Bailey v. Delta Electric Light, Power & Manufacturing Co.*, 86 Miss. 634, 38 So. 354. We think it is well settled in other states that a person in the employ of one person or company whose services are loaned by his employer to another company or person becomes, for the purpose of the work assigned to him, the servant of the latter company, that is to say, the company for whom the work is performed. In *Westover v. Hoover*, 88 Neb. 201, 129 N. W. 285, that court said:

“A person who is in the general employment of one person may be temporarily in the service of another with respect to a particular transaction or piece of work so that the relation of master and servant arises between them, even though the general employer may have no interest in the special work.”

In the case of *Wiest v. Coal Creek R. Co.*, 42 Wash. 176, 84, Pac. 725, the court said:

“Where an employer lends his employee to a third person for a particular employment, the employee, for

anything done in the particular employment, is the employee of the third person, though he remains the general employee of the employer. . . . An employee has a right to rely on the performance by the employer of the duty to furnish a safe place in which, and safe appliances with which to work."

See, also, *Hannigan v. Union Warehouse Co.*, 38 N. Y. Supp. 272; *Johnson v. Ashland Water Co.*, 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243; *Railroad Co. v. Loosely*, 76 Kan. 103, 90 Pac. 990; *Bailey on Personal Injuries* (2d Ed.) section 25; *Labatt's Master and Servant* (2d Ed.) section 17.

We think if the plaintiff's evidence be accepted as true he was entitled to a judgment against the Finkbine Lumber Company. The matter, at all events, should have been submitted to a jury under proper instructions.

*Reversed and remanded.*

---

ROBERTSON, REVENUE AGENT, v. BANK OF BATESVILLE  
ET AL.

[77 South. 318, Division B.]

1. DEPOSITORIES. *Effect of deposits. Ownership of funds.*

Funds paid by a county into a depository duly contracted with, are not funds of the county, and not trust funds, but become the funds of the depository bank.

2. DEPOSITORIES. *Actions against depositories. Cross-bills.*

Where the proceeds of a bond issue for the construction of bridges and roads, and the amount of *ad valorem* and commutation taxes were paid into one common fund under the direction of the county auditor, and warrants were paid by the county depository without keeping the accounts of the two funds separate, and the state revenue agent sued the depository for an accounting and a restoration of the road bond fund, a cross-bill by the de-

pository, asking that, if it should be held that it was not authorized to pay certain warrants from the proceeds of the bonds, it might be subrogated to the rights of the holders of such warrants and be allowed to collect the amount so paid from the road tax fund, was maintainable.

3. DEPOSITORIES. *Actions against. Doing equity.*

Where the revenue agent comes into equity and seeks equitable relief, he must be required to do equity, and the chancery court, in dealing with the matter, where the funds are commingled, will apply the funds as they ought to have been applied, applying to the bond funds such warrants as should properly have been paid from this fund, and allowing the depository to be subrogated to the rights of holders and to have funds paid in as *ad valorem* and road commutation funds applied to warrants which would have been paid out of such funds had the accounts been properly kept separate. If there should be any shortage in the road bond fund after so applying the warrants, then the judgment should be rendered to the amount of such funds so improperly paid out, and the revenue agent's commission should be limited to such amount as may be due by the depository after properly applying the warrants to the appropriate fund.

4. COUNTIES. *Actions by or against counties. Persons entitled to control.*

Since a county may sue through either the board of supervisors, the district attorney, the state revenue agent, or the attorney-general, the officer first instituting suit has the exclusive control thereof, if he acts in good faith and where the state revenue agent sued on behalf of the county, he represented the county in all phases of the litigation, and though not charged with the duty of defending suits against the county, was bound to conduct the litigation on behalf of the county as to any offset or counterclaim properly entertainable, unless the court authorized some other officer to appear and file appropriate pleadings necessary for the protection of the interest of the county.

5. COUNTIES. *Actions by or against counties. Persons entitled to control.*

In a suit by the revenue agent on behalf of the county against a county depository, which interposes a cross-bill, if the court thinks that the county's interest would be better conserved by permitting the attorneys for the board of supervisors to cooperate with the revenue agent, it may permit them to do so, but this authority must be exercised charily.

APPEAL from the chancery court of Panola county.

HON. J. G. McGOWEN, Chancellor.

Suit by Stokes Robertson, revenue agent, against the Bank of Batesville and others. From a judgment overruling a demurrer to a cross-bill, plaintiff appeals.

The facts are fully stated in the opinion of the court.

*Shands & Montgomery*, for appellant.

*Srone & Mayes, L. L. Pearson and L. B. Lamb*, for appellee.

ETHRIDGE, J., delivered the opinion of the court.

The state revenue agent filed a bill in the chancery court of Panola county, alleging that the board of supervisors of Panola county, at its April, 1913, meeting, directed the clerk to give notice of the intention of the board to issue road bonds to the amount of fifty thousand dollars for the purpose of building bridges and constructing roads in the county. After notice by publication, and at the next meeting of the board of supervisors, an order was entered upon the minutes for the issuance of fifty thousand dollars of the bonds of the county for the purposes mentioned. At an adjourned meeting held on the 21st day of May, 1913, the bonds were sold to John Nuveen & Co., of Chicago, for the sum of fifty thousand, five-hundred and ten dollars and accrued interest. The Bank of Batesville was at the January, 1913, meeting of the board of supervisors designated the county depository for Panola county, and qualified as such by giving bonds. The bonds sold to Nuveen & Co., were paid for in installments as follows: The first installment of ten thousand dollars delivered August 13, 1913, twenty thousand dollars delivered August 28, 1913, and twenty thousand dollars September 3, 1913. The chancery clerk issued a receive warrant authorizing the depository to receive this money and place to the road fund account of

the county, and these bond funds were entered upon the account books of the county and of the depository as road funds. Prior to the April, 1913, meeting, at which notice by the board of the issuance of the bonds was given, the county had issued and had outstanding something over thirteen thousand dollars in warrants for the working of the roads and building of bridges, and after said date continued to issue warrants for work done on the roads and bridges from time to time. After the funds for the bonds were paid into the treasury, these warrants for road and bridge construction were presented to the depository for payment and were paid out of the said fund. The county in addition to the sale of bonds to the amount of fifty thousand dollars, collected an *ad valorem* tax of three mills, which, under the pleadings, amounted to between eighteen thousand dollars, and twenty thousand dollars, and a road commutation or *per capita* tax aggregating, according to the pleadings, approximately fifteen thousand dollars. These taxes were paid into the depository as road funds, and warrants presented for payment absorbed these funds. When the depository made its quarterly report the first Monday of October, 1913, it showed only a small amount of the bond money on hand; this amount being between four hundred dollars and five hundred dollars then unexpended and the balance having been expended in payment of warrants, as above stated. The revenue agent filed a bill in which he alleged that the bonds had been issued, the money received by the depository, and that the money was not on deposit and had been expended, that the books of the county and of the bank or depository did not show the disposition of these road bond funds, alleging that it had been misappropriated and wrongfully applied in payment of other accounts not properly chargeable against this road bond fund, and prayed for a discovery from the depository of the disposition of such funds and the amounts disposed of, praying that, after an accounting, judgment should be rendered in

favor of the revenue agent, suing for the county, for the restoration of this fund. The depository filed an answer and cross-bill, setting out that it had received the fifty thousand, five hundred and ten dollars from the clerk on receive warrants on account of the road fund, and attached a detailed statement of warrants paid out of this fund, embracing the warrants outstanding prior to the notice to issue bonds and prior to the receipt of the funds for the bonds by the depository; said warrants having been drawn upon the road fund. It alleged that, under the law, when it received the funds, they became the funds of the bank, and that its obligation was not to keep the money in kind and in separate funds, but that its obligation was to pay said money out on warrants issued against it by the proper officers of the county, and prayed that, if the lower court should decide that it was not authorized to pay the warrants outstanding at the time of the order for the issuance of the bonds, or at the time of the receipt of the bond funds, then that it be subrogated to the rights of the holders of such warrants and be allowed to collect from the county, from the *ad valorem* and *per capita* road taxes fund, the amounts paid out of the road bond fund.

The revenue agent demurred to the cross-bill, contending that there was no equity on the face of the cross-bill, that the revenue agent was charged with a special statutory duty, that the depository was not entitled in this suit to offset the demand of the revenue agent, and that the revenue agent was limited to bringing suits, and not to defending suits and cross-demands. The court overruled the demurrer. Certain attorneys appeared and asked, in the name of the county, to intervene as parties to the suit, signing the motion by their firm name, as county attorneys. The motion does not disclose whether the firm of attorneys were employed by the board of supervisors, or in what manner or under what authority they represented the county. The court sustained the

motion for intervention, and granted an appeal to settle the principles of the case.

This court has decided that funds paid by the county into a depository duly contracted with are not funds of the county, and not trust funds, but become the funds of the bank. See *Potter v. Fidelity & Deposit Co.*, 101 Miss. 823, 58 So. 713; *Board v. Powell*, 109 Miss. 154, 68 So. 71. A depository is charged with certain duties of making reports and keeping accounts, and is charged with paying warrants properly drawn upon the funds of the county. Before they can be paid into the treasury the clerk must issue a pay or receive warrant, specifying the account to which the money is to be paid. This receive warrant is carried to the treasurer, and the treasurer—or the depository in lieu thereof—issues a receipt. Thereupon the county auditor enters the account on the books kept by him under the statute on behalf of the county against each officer. Section 352, Code of 1906 (Hemingway's Code, section 3725), provides:

“It shall be the duty of the county auditor to issue his receipt warrant to any person desiring to pay money into the county treasury, specifying the amount and the particular account on which such payment is to be made, and the fund to which it belongs; but a receipt warrant shall not be credited to the person making such payment, nor be charged to the county treasurer, until there shall be produced and filed with such auditor a duplicate receipt, signed by the treasurer, for the sum specified in such receipt warrant.”

By section 351, Code of 1906 (Hemingway's Code, section 3724), the auditor is required to keep a suitable book in which he shall enter the accounts of officers whose duty it is to receive or collect money for the county, exhibiting the debits and credits and what they represent, whether money, warrants, or bonds, and whether belonging to the general or any special fund, and that such books shall be at all times subject to the inspection of any citizen of the county. It seems, then, that under

the statute the county auditor is charged with the duty of determining into what fund money paid into the county treasury shall be paid. We do not believe that the county depository is authorized to supervise the auditor in his duties, and we do not think that the depository is chargeable with the mistakes of the county officers in determining to what fund certain moneys belong. The depository would have to have actual knowledge that the county auditor had placed money to the credit of the wrong fund to make it liable.

However this may be, we think in the present case that all of the moneys, both for bonds and for *ad valorem* and commutation taxes were paid into one common fund under the direction of the county auditor; that the cross-bill of the depository is maintainable, and conceding that the road bond fund is a special fund, and ought to be kept separate from the *ad valorem* and commutation tax fund, and that the funds of the road bonds cannot be used to pay past indebtedness, still the revenue agent, coming into equity and seeking equitable relief, must be required to do equity, and the chancery court, in dealing with the matter, where the funds are commingled, will apply the funds as they ought to have been applied, applying to the bond funds such warrants as should properly have been paid from this fund, and allowing the depository to be subrogated to the rights of holders and to have funds paid in as *ad valorem* and road commutation funds applied to warrants which would have been paid out of such funds, had the accounts been properly kept separate. If there should be any shortage in the road bond fund after so applying the warrants, then the judgment should be rendered to the amount of such funds so improperly paid out, and the revenue agent's commission should be limited to such amount as may be due by the depository after properly applying the warrants to the appropriate fund.

In regard to the proposition of intervention, we find that the county may institute suit through at least four



different officers: The board of supervisors may sue for the county; the district attorney may sue for the county; the revenue agent may sue for the county; and the attorney-general may sue for the county. The county is an intangible and impalpable person, that can only be represented by officers authorized by law. When several different officers are given concurrent right to sue, the officer first instituting suit has the exclusive control of such suit, if he acts in good faith. The court, however, has power to see that the officer representing the county acts in good faith, files appropriate pleas, and is in duty bound to apply the law as it should be applied, regardless of the contentions of either of the parties. The revenue agent, having sued on behalf of the county, represents the county, and is required to do the same equity that would be required of the county if the suit was maintained by any other officer or board authorized to sue. While the revenue agent is not charged with the duty of defending suits against counties, generally, yet when he institutes suit he is charged with representing the county in all phases of the litigation instituted by him. If an offset or counterclaim of any kind is properly entertainable, he must conduct the litigation on behalf of the county as to such cross demand or claim. If the court should reach a conclusion that the revenue agent, or any other officer clothed by law with authority to represent the county, is not properly and in good faith conducting the litigation for the interest of the county, then the court may direct and control the proceedings, and may authorize some other officer to appear and file appropriate pleadings necessary for the protection of the county interests. .

In the present case the cross-bill by the bank sets up all defenses that the attorneys claiming to represent the county seem to desire presented, and the motion to intervene was unnecessary. However, if the court thinks that the county's interests would be better conserved by permitting the attorneys for the board of supervisors

to co-operate with the revenue agent, it may permit them to do so; but, of course, this authority must be exercised charily. The judgment of the court is affirmed, and the cause remanded for further proceedings.

*Affirmed and remanded.*

---

HUFF ET AL. v. BEAR CREEK MILL Co.

[77 South. 306, Division B.]

1. MASTER AND SERVANT. *Injuries to servant. Contributory negligence.*

Where the line of shafting which caused the injury and death of a deceased servant was unprotected and uninclosed and, revolving at a high rate of speed, was apt to cause the clothing of persons passing near it to entwine around and throw them upon the shafting, and it was liable in case the belt was being sewed to cause the strings of the belt to strike against the rapidly revolving shaft and jerk and draw a person holding it, upon the shafting, and injure him, and the shafting could have been inclosed and rendered safe at a trifling expense and all danger thus avoided. In such case the master did not furnish the servant so killed with a safe place to work.

2. SAME.

In such case even though the servant was guilty of contributory negligence, this under our statute would not constitute a defense but would only entitle the master to measure his negligence against the negligence of the employee.

3. DEATH. *Damages. Adequacy.*

In a suit by a son for the death of his father, an award of fifty dollars was grossly inadequate, where there was no question as to the right of the son of deceased who was entitled to recover one-half of the damages on account of deceased's suffering before death, together with one-half of the value of his expectancy, such amounts being subject only to deductions on account of deceased's contributory negligence.

4. RELEASE. *Adequacy. Evidence.*

Under the evidence in this case the court held that the finding of the jury that the payment of five hundred dollars by the master to the widow of a deceased employee was not in full settlement of her claim for damages, was warranted, such a payment being inadequate for that purpose.

APPEAL from the circuit court of Green county.

HON. R. M. HEIDELBERG, Judge.

Suit by Hattie Moore Huff and another against the Bear Creek Mill Company. Affirmed and defendants appeal and reversed and remanded on plaintiff's appeal, for the purpose of assessing the amount of damages.

The facts are fully stated in the opinion of the court.

*E. W. Breland* and *Stevens & Cook*, for appellants.

*Watkins & Watkins*, for appellee.

ETHRIDGE, J., delivered the opinion of the court.

The appellants brought suit against the appellee for the death of Jim Moore, a former husband of Hattie Moore Huff, and father of Earnest Moore. Jim Moore was employed as a laborer by the Bear Creek Mill Company, and was at the time of the injury resulting in his death engaged in assisting the engineer in repairing a pulley belt used in the operation of the mill. Moore was holding the belt and Browning, the engineer, was sewing it together with rawhide strings. The belt was over a revolving shaft, and Moore was sitting or standing on one side of the belt, and Browning was on the other, Moore holding the belt to keep it off the revolving shaft. The shaft was some three or three and one-half feet above the ground floor, and was revolving at the rate of between three hundred and three hundred and fifty revolutions per minute. Moore was either jerked upon the revolving shaft by the belt or by the clothing, it does not clearly appear which, but he was injured by having one of his arms torn off, the other arm broken, his

back broken, and his legs broken. He lived some thirty days from the time of the injury, and died as a result of the injury.

There are four counts in the declaration. The first count charges the company with negligence in undertaking to repair the belt without shutting down the machinery; that if the machinery had been stopped the injury would not have occurred. The second count charges the company with negligence in sewing the belt while so close to the revolving pulley that the thongs or strings with which the belt was sewn became entangled with the revolving shaft and pulled the deceased upon it. The third count charges that it was negligence for the company to use a revolving shaft without having the same properly protected and inclosed; that if the shaft had been properly incased and protected the injury would not have been inflicted. In the fourth count it was charged that it was negligence on the part of the company not to have an engineer at the engine ready to close down the machinery in case of danger, or on discovering the perilous situation of the deceased.

It was pleaded by the defendant, in addition to the general issue, that there was a settlement and release for the sum of five hundred dollars signed and executed by Hattie Moore Huff. There was also a plea that Earnest Moore was not the legitimate son of the deceased, but this plea was withdrawn at the trial and the legitimacy admitted; and also a plea by defendant that Moore's death was proximately caused by his own negligence, and that he was guilty of contributory negligence. The appellant Hattie Moore Huff denied that she signed the release with knowledge of its nature and character, and denied that it was a full and complete settlement of the injury, but claimed that she understood that it was merely a settlement of an insurance liability under a policy held over the life of the deceased, the premiums of which he paid to the company monthly.

There was a verdict for fifty dollars for the appellants, and from this judgment the appellants prosecute an appeal, and appellees a cross-appeal.

There were objections and exceptions to certain evidence tendered in the trial of the cause, and to certain instructions given, but the main contentions center around the questions of the sufficiency of the verdict under the facts, raised on the direct appeal, and, on the cross-appeal, whether there should have been a peremptory instruction for the defendant. Some of the instructions for the defendant below were objectionable, and especially instruction No. 14, but as the jury found in favor of the plaintiffs on the liability, these instructions are not material to the result here. We will first deal with the question of whether there should have been a peremptory instruction for the defendant.

It appears that the line of shafting which caused the injury and death of the deceased was unprotected and uninclosed, and that, revolving at a highly rapid rate, it was apt to cause the clothing of persons passing near it to unwind around, and throw them upon, the shafting, and that it was liable, in case the belt was being sewed in the manner that this one was, to cause the strings of the belt to strike against the rapidly revolving shaft and jerk or draw a person holding it upon the shafting and injure him. It further appears that the shafting could have been inclosed and rendered safe at a trifle of expense and all danger avoided altogether. It further appears that if the engine had been shut down for four or five minutes, it would have been safe, and that no injury would have occurred. It is true that one of the witnesses introduced by plaintiffs, the engineer of the defendant, testified to facts that would tend to show contributory negligence, and testifies to a statement by the deceased subsequent to the injury that it would not have occurred had the deceased obeyed the said engineer when he motioned to stand back. It clearly appears, however, that with the shaft revolving, exposed as it

was, it did not constitute a safe place near which to work. And under our statute whatever the jury may have believed with reference to the truthfulness of this statement, it would not constitute a defense, but would only entitle the defendant to measure the negligence of the master against the negligence of the employee. It follows that the peremptory instruction requested by the defendant was properly refused.

Upon the direct appeal we think the proof warranted the jury in finding for the plaintiff, and that there is no reversible error bearing on the question of liability in the record. The amount of damages, however, is grossly inadequate, and cannot be sustained. There is no contention or dispute as to the right of Earnest Moore, the son of deceased, to recover one-half of whatever damage may be awarded reasonably to compensate the deceased for the suffering, and expense incurred, by reason of the injury during his lifetime, and of the right of the said minor, as son, to recover one-half of the value of the expectancy of the deceased, subject only to such deduction as the negligence, if any, of the deceased may have reduced the damage. On this record we think it could not be reduced to the extent indicated by the verdict.

The jury found for the plaintiff Hattie Moore Huff on the question of compromise and settlement involved in that plea, and we see no reason to disturb the verdict of the jury on this question. The amount paid to her by the defendant was far too small to compensate her for the actual damages, and the case will be affirmed as to liability, reversed as to amount of damages, and remanded solely for the purpose of assessing the amount of damage.

*Reversed and remanded.*

## WEIL BROS. v. WITTJEN.

[77 South. 308, Division B.]

1. SET-OFF AND COUNTERCLAIM. *Grounds. Mutual indebtedness.*

Where plaintiff's declaration alleged that defendant was indebted to him on cotton purchases made for plaintiff, defendant could plead as a set-off that a true accounting of such transactions showed a balance due him, since the account of each of the plaintiffs and defendant recognized mutual dealings and mutual indebtedness.

2. PLEADING. *Set-off. Code 1906, section 741.*

Under Code 1906, section 741, so expressly providing the general issue and a set-off may be pleaded together.

3. SET-OFF. *Counterclaim. Grounds. Liquidated demands.*

Where plaintiff's declaration alleged that defendant was indebted to him on cotton purchases and defendant pleaded that a true accounting showed a balance due him, such a counterclaim is not an unliquidated demand, but is founded on contract, capable of calculation, and may be pleaded as a set-off.

4. DEPOSITIONS. *Failure to answer questions. Effect.*

Where a deposition was taken on notice, but not under the statute, it could not be treated as answers to questions propounded under the statute, but should be treated as an ordinary deposition, and if the answer was not specific it should be suppressed, but judgment should not be rendered as under the statute for the adverse party especially where the witness replied with reasonable fullness by referring to testimony taken in another deposition.

APPEAL from the circuit court of Marshall county.

HON. J. L. BATES, Judge.

Suit by Weil Bros. against Hans Wittjen. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

*C. Lee Crum*, for appellant.

There are three principal questions of law involved in the presentation of this case as presented by the facts above recited:

First: The demurrer filed by the plaintiff to the pleas of the defendant should have been sustained.

(a) The plea of general issue (denying, *in toto*, that defendant owes the plaintiff anything in the manner and form alleged in the declaration) and the plea of set-off. (Under which defendant obtained his judgment) should not have been pleaded in one and the same plea.

(b) Because the matters pleaded to set-off, or raise the issue of a counterclaim, cannot be pleaded with the general issue.

(c) Because the pleas show that the set-off claimed does not constitute mutual indebtedness of the parties.

(d) Because the plea of set-off constitutes a claim for unliquidated damages.

Second: The court pursued and unauthorized course in suppressing the deposition of Isidor Weil for failure to answer interrogatory 8 more fully and for failure of the notary to affix his seal to his certificates and entering the judgment appealed from.

Third: The interrogatory filed in court by the defendant to plaintiffs as non-resident parties to the suit afforded no ground whatever for the court to enter the judgment it did, for the reason that the plaintiffs had faithfully answered this interrogatory before the motion was made.

I desire to argue these three legal propositions in the order given and will present here argument to show that the court erred in overruling the demurrer. If the court below should have sustained the demurrer to defendant's plea of set-off then the judgment here appealed from must necessarily be reversed.

The right of a defendant to plead set-off, in a court of law is purely a statutory right, as the practice was not known to the common law, which has prevailed in



this state since its separate sovereignty began. *Raymond v. State*, 54 Miss. 565; *Henry v. Hoover*, 6 S. & M. 418, quoted with approval in *Hoover Chemical Company v. Humphrey* (Miss.), 66 So. 214. Section 745, Code 1906, the statutory authority in this state at the time for a plea of set-off, provides there must be mutual indebtedness existing between plaintiff and defendant before the plea of set-off can be filed.

In the case at bar, as in the cause of *Hoover Chemical v. Humphrey*, *supra*, it can consistently be said: "The claim of plaintiff for damages from breach of contract presented in this declaration and the claim of the defendant for damages from breach of contract as presented in its set-off are each based on one and the same transaction." "If plaintiffs have a right of action, then defendant has none. The existence of the right in either of the parties negatives the existence in the other."

This construction of the meaning and import of section 745, Code 1906, is by the latest decision of our own court and it seems unnecessary to go to the decisions of other states where the statutes being construed vary in some respects from our statute. I therefore submit that the court erred in overruling the demurrer and for this reason, if there were no other reasons to follow, the judgment appealed from should be reversed.

The claim is not pleadable in this case for the further reason that it is one for unliquidated damages, resulting, as alleged by defendant in the plea, from the fraud of the plaintiff in failing fraudulently to give an honest grading and by making false and fraudulent returns thereof, and the claim of the plaintiff is also unliquidated. 34 Cyc. 654, par. 2; *Burrus v. Gordon*, 57 Miss. 93; *Hayes v. Shiddell Liq. Co.*, 55 So. 356.

This brings us in the argument to the action of the court in suppressing the deposition of Isidor Weil for his alleged failure to answer more fully Cross-Int. No. 8 and for failure of the notary to affix his seal to his certificate.

Section 1935, Code 1906, provided that exceptions to depositions shall be filed in circuit courts in this state before the beginning of the trial, and when sustained, "the court may, in proper cases, allow time to retake the deposition. Where the notary of some distant city out of the state without knowledge of the party taking the deposition, or his attorney, fails to affix his seal and the party taking the deposition has not time nor opportunity to have the seal affixed so as to authenticate the deposition after it has been filed, I most respectfully submit, does constitute a proper case," to allow the deposition to be retaken and that the word, "may" means the court shall allow it retaken. See *Standard Life Company v. Temesey*, 73 Miss., 726; *Hartford v. Green*, 52 Miss. 332; *Jones v. Loggins*, 37 Miss. 546. But from every standpoint of reason and the facts and circumstances surrounding this case it clearly and unavoidably appears that the averment in the motion that plaintiff utterly failed to answer this question, is unsupported.

### CONCLUSIONS.

1. The suit of appellants is for unliquidated damages to which set-off cannot be pleaded.

2. The plea of set-off itself is a claim for unliquidated damages for the alleged fraud of appellants in their grading of the cotton in question and for this reason cannot be used as a set-off.

3. The plea of set-off filed in this case negatives mutuality of indebtedness between the plaintiff and the defendant, and for this reason cannot be pleaded as a set-off.

4. The plea of general issue, denying all liability, and the plea of set-off therewith averring facts which negative the necessary mutuality of indebtedness, cannot be pleaded together.

5. The demurrer of the plaintiffs to the plea of set-off should therefore now be sustained, as it should have been sustained by the court below, and the judgment appealed from be reversed on this account, if for no other reason.

6. The court below could lawfully have done no more for the failure of Isidor Weil, as a witness in his own behalf, to answer fully cross-int. 8 in his deposition and the failure of the notary public to affix his seal to the certificate than suppress the deposition of the witness and permit the trial to proceed on the merits. Even this, under the facts shown by the record, would have been unjust and arbitrary, but for these defects in the deposition this is all that the law would have authorized or tolerated in the court below.

7. The court below had no authority under section 1938, Code 1906, to dismiss plaintiffs' declaration and give judgment on the plea of set-off for the reason (if for no other) that the plaintiffs had, six months prior to the filing of the motion faithfully and fully answered in every detail and in every particular the interrogatory pronounced to them as non-residents.

I therefore most respectfully submit that the court should here sustain the demurrer of the plaintiffs to the plea of set-off and reverse the judgment of the court below and remand this cause for a trial on the merits.

*Lester G. Fant*, for appellee.

The record in this case presents two points to be decided by the supreme court, or rather two decisions of the circuit court of Marshall county to be reviewed by the supreme court.

The first is the overruling of the demurrer of plaintiff to a plea of set-off filed by the defendant, the record discloses that the appellants, Weil Brothers, had the appellee, Hans Wittjen buying cotton for them at Holly Springs, Mississippi, under an agreement that they were to pay a stipulated price for the cotton at whatever grades the cotton happened to be classed by

them. Wittjen was buying cotton and shipping it to them, and they were paying him for the cotton and he was paying them for differences in loss of weights and for waste cotton, or rather for cotton gathered in sampling known as "loose." Their dealings were absolutely mutual and clearly brought the plaintiff and the defendant within the statute in Mississippi allowing set-off. (See *Hoover Commercial Company v. Humphrey*, 107 Miss. 810.)

To quote from the opinion of Judge REED: "Our present statute (section 745, of the Code of 1906) reads: 'Where a mutual indebtedness exists between the plaintiff and defendant, the defendant may plead and set-off against the demand of the plaintiff any debt which he may have against the plaintiff.' This language is practically the same in the Codes of 1892, 1880, 1871 and 1857. It will be seen that the statutes contemplates a mutual indebtedness between the parties. This implies that there was a dealing together between them, so that each became indebted to the other. "Mutual" means reciprocally acting, giving, receiving, interchanging. A mutual account is one in which there must be reciprocal demands; charges by each party against the other; like accounts between merchants. If the demand is only on one side, the account is not mutual.

The next and only other question raised in the record is the order of the court rendered upon the motion of defendant for judgment against the plaintiff and non-resident. Section 1938 of the Code of 1906, provides as follows: "If the testimony of a party to the suit who resides out of the state be desired by the adverse party, interrogatories to him may be filed in the clerk's office, and a copy thereof, with notice of filing, shall be given the party, or his attorney or solicitor; and if he fail to answer such interrogatories within a reasonable time, his plea shall be dismissed, if he be plaintiff or complainant, and if he be defendant, his plea or answer may

be taken off the file and judgment by default entered, or the bill be taken as confessed."

It will be seen in the case at bar that interrogatories were filed on the — day of —, —; that for various and sundry reasons on the part of plaintiffs, Weil Brothers, no answers were filed to these interrogatories for a space of so many months and then for the first time an attempted answer made. In the meantime, by an agreement with the counsel for plaintiff, a deposition was agreed on which should be in lieu of the answer to the interrogatories, and when this deposition came, the court saw at once that the non-resident plaintiff had refused, although he had had abundant time, to answer the question that was absolutely pertinent and the correct answer of which would decide the case in favor of the defendant and give him the judgment sued for in his set-off. This the court, being fully advised as to all facts and understanding the whole situation, exercised its rightful discretion that there existed at that time a willful and continual refusal on the part of the non-resident to answer pertinent questions put to him legally, and for this reason decided that this statute had been violated by the non-resident plaintiff in a willful manner and that the defendant was entitled to his judgment under this section of the Code.

ETHRIDGE, J., delivered the opinion of the court.

Weil Bros., a partnership doing business at Montgomery, Ala., composed of Isidor and Emil Weil, made a contract with Wittjen to buy cotton for them at Holly Springs, Miss. Under the contract it was provided and understood that the cotton bought under the contract was to be paid for by drafts drawn upon the plaintiffs with bills of lading for the cotton attached; that the price was to be for a certain grade, and if the cotton shipped went above the grade, Wittjen was to be credited with the difference in price above the contract grade,

and if it went below the contract grade, he was to make good by paying the difference in the value of the contract grade and the grade which the cotton actually was. To the declaration was attached as an exhibit a statement of the cotton shipped, showing numbers, weight, and price. In one column was shown the amount of loss to the plaintiffs; in another was the amount of gain. Taking the statement of Weil Bros., plaintiffs, the balance in their favor amounted to four hundred and ninety-four dollars and fifty cents..

The defendant filed a plea in the nature of an offset, to which was appended a statement of the cotton shipped, showing numbers, weights, and prices, and also showing the loss or gain on several bales, with a balance in favor of defendant of one thousand eight hundred ninety-five dollars and ten cents.

This plea was demurred to by the plaintiffs on the grounds: First, that the plea was a plea of general issue and a plea to set-off, joined in one plea; second, because the matters pleaded to set off the claim could not be pleaded in this suit; that the defense constitutes no matters of mutual indebtedness between the plaintiff and defendant; and that the plea sets up an offset for unliquidated damages. The demurrer was overruled by the court. Thereafter the defendant propounded interrogatories to the plaintiff, under Code, section 1938, in which interrogatories the plaintiffs were to furnish or answer giving the information as to transactions with the defendant, and in which the plaintiffs were requested to give the grades of the long list of cotton shipped by the defendant from Holly Springs, Miss., during the cotton season of 1913-1914, the number of bales, with marks, being attached to the interrogatory. These interrogatories were filed on the 14th day of November, 1914, and the answer of defendant was dated the 2d day of February, 1916. To this interrogatory the plaintiffs attached an answer showing grades and marks of the number of bales. On the 6th day of July, 1916, plaintiffs propounded questions

to Isidor Weil, which interrogatories by the plaintiffs were crossed by the defendant. In the particular cross-interrogatories under this deposition practically the same questions were asked Isidor Weil as had been propounded under the statute to the plaintiffs. In answer to the eighth cross-interrogatory he stated that "this information has been given previously and is in the hands of the defendant's attorney," not answering the interrogatory to this deposition in detail as in the interrogatory propounded under the statute. The cause came on for trial, and the defendant moved to strike out the pleadings and for judgment for the defendant on its cross-demand for failure of plaintiffs to answer specifically the eighth cross-interrogatory. When this motion was made the counsel for plaintiffs offered to retake the deposition if the court thought proper to do so, and have the witness answer specifically, stating to the court that the deposition had been filed only a few days, and that he had not the opportunity to inspect it before that term of court because of being engaged elsewhere. The court sustained the motion and granted final judgment for the defendant for the gross amount, from which judgment this appeal is prosecuted.

On the first proposition it was insisted by the appellant that under the authority of *Hoover Chemical Co. v. Humphrey*, 107 Miss. 810, 66 So. 214, a set-off cannot be maintained in this case, and that the plea of general issue and the plea of set-off cannot be pleaded together. In the present case the plaintiffs, in their declaration, recognize in or give to the defendant a claim for a certain amount on a certain number of bales of cotton, and on certain other bales and certain other shipments charge the defendant with a balance due, thus recognizing the right of defendant to an indebtedness for a certain number of bales, and charging him with amounts due plaintiff for certain other bales, and undertaking to charge him with the difference according to their contention between the two amounts. The defend-

ant in the plea of set-off makes out an account in like manner, recognizing that on certain shipments and certain bales of cotton the plaintiffs were entitled to recover of the defendant certain amounts, but contending that on certain other bales of cotton and certain other shipments the plaintiffs were indebted to the defendant. The account of each of the plaintiffs and defendant recognized mutual dealings and mutual indebtedness, and the case of *Chemical Co. v. Humphrey* is therefore not applicable here. Under the statute, section 741, Code of 1906, it is expressly provided that the general issue and set-off may be pleaded together, as well as numerous other pleadings, and the court was correct in overruling the demurrer to the plea. The liability in this case is recognized, and the amount due appears certain if either the plaintiffs' or defendant's pleas were taken alone, but they differ only as to certain particular bales of cotton. This is not an unliquidated demand, but is a demand founded on contract, capable of calculation, and the only dispute is as to the questions of fact.

We think, however, the case must be reversed because of the error of the court in sustaining the motion of defendant to strike the plaintiffs' pleadings from the files, because of a failure to answer specifically the cross-interrogatories to a deposition taken by the plaintiffs. We think the interrogatories which were propounded under the statute, while there was a delay in answering them, were on file at the time the motion was made and had been on file some months, and it does not appear that there was any willful purpose to refuse to give the information called for. The plaintiffs' deposition, taken as it was in the case on notice, could not be treated as answers to questions propounded under the statute, but should be treated as an ordinary deposition, and if the answer was not specific, it should be suppressed, but judgment should not be rendered as under the statute. The answer, however, of the witness, that the information had theretofore been given and was in the possession of defend-



ant's attorney, was an adoption by reference to the statement rendered under the statute; and we fail to see where it is so uncertain and evasive as to justify the action taken by the court. It seems to us, looking at the answer and the interrogatories propounded, that the information is as specific as an ordinary, intelligent witness would ordinarily answer a similar question. It does not appear from any specifications that any information was withheld that was called for by the interrogatory.

Judgment is therefore reversed, and the cause remanded.

*Reversed and remanded.*

---

SCOTT & GARRETT v. GREEN RIVER LUMBER Co.

[77 South. 309, Division B.]

1. DAMAGES. *Duty to reduce damages. Landlord's lien.*

A landlord cannot pay to his tenant who is indebted to him sums of money in excess of the amount due by the tenant, and thereafter recover the amount due by the tenant from a purchaser of products of the tenant in good faith.

2. SAME.

In such case the landlord could not be required to apply any money which would be exempt to the tenant to the liquidation of his debts, but he must use reasonable means to reduce his damages.

APPEAL from the circuit court of Quitman county.

HON. W. A. ALCORN, JR., Judge.

Suit by the Green River Lumber Company against Scott & Garrett. From a judgment for plaintiff, defendants appeal.

The facts are fully stated in the opinion of the court.

*P. H. Lowry*, for appellant.

Under the evidence in this case, the defendants were at most, only sureties for the payment of this rent, Norris being the principal debtor. Norris owed them an indebtedness secured on his crop, more than the crop paid, and was still largely indebted to them, and there is no pretense of proof that they ever agreed with Norris to pay this indebtedness, in consideration of the receipt of the crop. They were only secondarily liable, or in other words they were sureties.

Mr. Black in his Law Dictionary, says: "A surety is defined as a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so."

To the same effect: 27 Am. & Eng. Ency. Law, page 431; *Smith v. Sheldon*, 24 Am. Rep. 333. While there is some conflict of authority, the reasonable, just and general accepted rule is that where a principal creditor has the means of satisfaction actually within his grasp, he must retain it for the benefit of the surety, *Lichtenhalters v. Thompson* (Penn.), 15 Am. Dec. 583; *Baker v. Briggs*, 19 Am. Dec. (Mass.) 316; *White v. Life, etc.*, (Ala.), 35 Am. Rep. 45; 27 Am. Eng. Ency. Law (2 Ed.), 516 and 520. In the case of *Moreland v. Peoples' Bank*, 74 So. 828, this court recently held that the rule above stated will not be applied in this state if a bank is dealing with the funds of its depositors. I do not understand that the court means to repudiate this general doctrine, which is correct and wholesome; but this court as I gather only declined to apply it to banks, for the reason stated in the *Wilkes-Barre v. Legrande*, 103 Pa. 309, quoted, as I take it, approvingly by this court. It is not necessary, however, to apply this rule in its strictness in this case. Here the plaintiff was actually indebted to Norris, at the very time the suit was

brought, in a sum much larger than the debt for which the defendants were surety and had notice that Norris was a non-resident and was insolvent, and that the defendants were delaying a settlement for the very purpose of getting the money out of Norris. Further than that, they knew of the plea and notice of the defendants in this case, and by the interrogatories filed for them to answer, that the defendants were defending this suit on that very ground. Under these circumstances, the appellee deliberately, and as we think the evidence shows, fraudulently handed this cash over to the principal debtor, ordinarily releasing the surety, it seems to me that there can be no question about the payment, under the circumstances in this case releasing the surety.

It may be true also, that ordinarily the payment of a salary or wages to an employee would not come within the rule. In the present case, while the amount was paid for services, it is not within the reason of the exception. Here it was not a payment of a running salary, but a payment of quite a sum of money that had accumulated from a salary much more than sufficient for ordinary living expenses.

Independent of the notice under the general issue in this case, the defense that the plaintiff at the time the suit was brought had sufficient funds of the principal in its hands to pay the debt, might have been made under the general issue. 32 Cyc., 130.

The defense by a surety of release by the dealings of the creditor with the principal, is a legal defense, while it may arise out of the equitable doctrine of marshalling securities and at least a kindred doctrine, it may nevertheless be made in a suit at law. Besides, where the surety is sued alone, he may set up any defense, legal or equitable. 32 Cyc., 149; 27 Am. & Eng. Ency. Law (2 Ed.), 489; *Smith v. Clopton*, 48 Miss. 66. To sum up my position in this case, it is as follows: First, the appellants (defendants) are surety for a debt of Norris, the tenant; second, the appellee (plaintiff)

after the debt of Norris, the principal, became due, and before this suit was brought, and at the time this suit was brought was indebted to Norris' and had funds of Norris; in its hands, much in excess of the debt for which appellants are surety; third, the appellee knew that the crop of Norris had been applied on the indebtedness of Norris to the appellants, incurred in the making of this crop, and that it was not sufficient to pay the indebtedness; fourth, the appellee knew further that the appellants were delaying the payment of Norris' debt, in order that Norris might pay it himself; fifth, this notice had been brought to appellee, not only by the defense set up in this case, but by searching interrogatories, propounded to the appellee by the appellants in the course of the litigation; sixth, the appellee with this knowledge, and with no excuse except the purpose to make the surety pay the principal's debt, paid to the principal, a much larger amount than the indebtedness for which the appellants were surety; seventh, by this course, of dealing and these transactions between the creditor and the principal debtor the surety is released. So far as the surety is concerned, the debt is paid and the creditor cannot demand of them the payment of it or the indebtedness for the payment of which it had in its actual possession much more than enough of the principal debtor's money to satisfy and which it deliberately and purposely paid over to him. This is a gross fraud and an injustice to the surety, which the courts of justice will not permit. I therefore must respectfully submit that this case should have been submitted to a jury and that it was error for a court to give a peremptory instruction of the plaintiff and it should be reversed and remanded for a trial by a jury under proper instructions.

*J. E. Holmes*, for appellee.

We respectfully submit that a clearer case cannot be stated for the application of the lien of the landlord for his rent. The statute is not open to construction.

"Every lessor of land shall have a lien on the agricultural products of the leased premises, however and by whomsoever produced, to secure the payment of the rent and this lien shall be paramount to all other liens, claims or demands upon such products." (Sec. 2832, Code 1906.)

It is equally clear that the lien will prevail against even a *bona-fide* purchaser for value, and that the landlord is not confined to the statutory remedy the lien is broader. *Newman v. Bank*, 66 Miss. 323-337; *Henry v. Davis*, 60 Miss. 212; *Fitzgerald v. Fowlkes*, 60 Miss. 270; *Cohn v. Smith*, 64 Miss. 816.

But learned counsel for appellants seems to take the position that as between landlord and tenant there exists the relation of creditor and debtor and that the defendant merely became sureties for Norris the debtor of the plaintiffs, and upon this theory learned counsel builds the foundation for his assignment of error. It is true that the subtenant stands in the relation of surety for the tenant, but I do not find any case holding that a creditor of the tenant or a creditor of a subtenant is surety for the tenant.

In this case the defendants, Scott & Garrett, purchased the cotton and applied the proceeds, knowing that the landlord's lien existed against the cotton. In other words the cotton was converted by the defendants with the knowledge that there existed a lien against the cotton for the payment of the rent. In fact, there was an implied understanding that the proceeds of the cotton should pay the rent, and it is impossible for the defendants to escape the effect of their letter shown on page 107 of the transcript in which said letter the defendants admit the claim of the plaintiffs. The defendants say in said letter: "Mr. Norris told us the only claim there is or will be on his crop will be your claim for land rent only. Will you please verify his statement to us?" The plaintiff verified this statement and the defendants took over the cotton upon that understanding. Not only so,

but learned counsel's position is not tenable either on the law, nor upon the particular facts in this case.

In the second place, if the defendants were surety for the payment of the rent, and nothing more, then they (plaintiffs) could not be compelled to apply money which came into their hands to the rent account, but would have the right to apply such funds to the payment of other accounts if they desired to do so. This under the authority of *Moreland v. People's Bank*, 74 So. 828.

In the third place, the plaintiffs have never been indebted to Norris. If they had applied Norris' salary to the payment of Norris' debt, and had not paid it to him in cash, Norris would still be indebted to the plaintiffs. In other words, the whole contention of counsel is to the effect that the plaintiff should have charged the rent on open account and permitted Norris to be in debt to them to an additional amount equal to the rent, and then applied on the whole account the salary promised to Norris. But for the plaintiffs to have taken this course would have resulted in the loss of the service of Norris, and would not have brought about the payment of the rent.

We most respectfully submit that the appellants cannot prevail in this case upon any theory advanced by learned counsel.

Wherefore, in conclusion, we answer learned adversary counsel as follows: First, the appellants (defendants) are not surety for the debt of Norris, the tenant; second, the plaintiff, appellee, was not indebted to Norris and has had no funds belonging to Norris in its hands with which to pay the rent debt of Norris; third, the appellee was not concerned with whether or not the debt of Norris to the appellants had or had not been paid; fourth, the appellee was not compelled to retain Norris in its employ indefinitely in order that Norris might work out on a salary basis rent due in the fall of 1914; fifth, therefore, it was unnecessary to have brought home to the appellee any claim of the appellants to such

effect, because appellee had a right to rely upon their statutory lien for the payment of the rent; sixth, the appellee has not sought to make any surety pay any principal debt. The appellee simply desires to have the defendants, who converted the cotton upon which there was the landlord's lien to pay to the landlord the amount of rent due and not paid. *Peets & Norman v. Baker*, 95 Miss. 577; seventh, even if appellants were sureties, the surety cannot be discharged until the debt is paid, and the rent still remains unpaid in this case. We do not know of any rule which requires a landlord to wrongfully appropriate the wages of an employee in order to collect his rent; such a proceeding would be a gross fraud and injustice to the employee, which this court of justice will not require.

Not only so but, it is simple justice that the landlord should receive his rent, even though the landlord does have other dealings with his tenant and the tenant is indebted to him on other accounts. The landlord is not required by law to hold back the wages which he owes the tenant or other employee until the wages amount to enough to pay the rent, and then apply such wages to the payment of the rent contrary to his contract with his employee, thereby defrauding his employee out of the fruits of his labor. Yet such is the contention of the appellants here, who insist that the wages earned in 1915 and 1916 by Norris should have been applied to the payment of the rent for land leased in 1914 when Norris, the tenant, had turned all of the cotton produced by him in 1914 to the appellants, and the appellants knew that the rent had not been paid when they received the cotton, and acknowledged under their own signature that the landlord had his lien for rent. The mere statement of the issue raised on the assignment of error is sufficient to show the fallacy of the contention.

ETHRIDGE, J., delivered the opinion of the court.

The Green River Lumber Company filed suit in the circuit court of Quitman county against Scott & Garrett, a mercantile firm doing business in said county, for three hundred forty-six dollars and thirty-two cents, alleged to be the amount of rent due the Green River Lumber Company by one J. S. Norris, who rented certain lands from the lumber company, Scott & Garrett having purchased products grown upon the leased premises during the year 1914, amounting to more than said amount claimed as rent. The defendants, Scott & Garrett, contended that, in November, 1914, Norris went to work for the Green River Lumber Company as a laborer or superintendent of the sawmilling business, at and for the sum of one hundred dollars per month, and that between November, 1914, and the date of judgment twenty-one months had elapsed, and, Norris being a single man, that it was the duty of the Green River Lumber Company to collect from Norris as much as possible so as to reduce its claim, or to collect it in full, out of the wages earned by Norris. It appears in the record that, in addition to the rent of three hundred forty-six dollars and thirty-two cents, Norris was indebted to the lumber company on a different account for about five hundred eighty-four dollars, making a total indebtedness due by Norris to the lumber company at the time he was hired of approximately nine hundred dollars.

At the conclusion of the evidence the court granted a peremptory instruction to find for the plaintiff, Green River Lumber Company, and refused two instructions requested by the defendants, Scott & Garrett. The refused instructions are as follows:

"The court instructs the jury that, if they believe from the evidence in this case that the plaintiff was, at any time after the rent here sued for became due to them from the tenant, Norris, indebted to the said Norris in any sum, and that they paid him any amount that they were



so due him instead of applying it to the rent due them by the said Norris, and if the jury further believe from the evidence that the purchase of the cotton raised on the leased premises by the defendants was for a good and valuable consideration, and that they did not, in consideration of such purchase, assume or promise to pay the rent due by the said Norris to the plaintiff, the plaintiff thereby released the defendants from their liability for said rent to the extent of such payment so made by them to the said Norris, and the jury should deduct from the amount of the rent sued for such sum as the evidence shows was so paid by the plaintiff to the said Norris and return their verdict only for such balance, if any, as is now due to the plaintiff on said rent after the deduction of such payments so made by them to the said Norris."

"The court instructs the jury that, if they believe from the evidence that the plaintiff was at any time indebted to the tenant, Norris, in a sum equal to or exceeding the amount due to them by the said Norris for rent, and that the plaintiff paid the said sum to the said Norris instead of retaining it in satisfaction of the rent due them by the said Norris, the defendants were thereby released from their liability on account of the purchase of the cotton raised on the leased premises, if said purchase was in good faith and for a valuable consideration, and if the defendants, in consideration of the purchase, did not assume and agree to pay the said rents, and if the jury so believe, they should find for the defendants."

The question arises for decision as to whether a landlord having a claim for rent against the tenant, and having a right under the statute to resort to the products grown upon the leased premises for satisfaction thereof, and also having an action against any person buying said products, with or without notice of the landlord's lien, and who has become indebted to the tenant for wages due, or in some other manner, is bound to withhold the amount due to the tenant and apply it on the indebtedness due by the tenant before resorting to a third person,

who has bought products grown upon the land and paid value therefor, for the amount due.

In the case of *Applewhite v. Nelms*, 71 Miss. 482, 14 So. 443, involving the construction of section 2495 of the Code of 1892, under which statute the landlord has a lien on all products grown on the leased premises, the question for decision was whether or not he could resort to a subtenant's crop for satisfaction of his lien without first having exhausted the products and crops of the main tenant and his right to proceed against the buyers of such products from the tenant before resorting to the crops of a subtenant. The court held, in effect, that the relation existing between the landlord and subtenant was that the subtenant was a surety for the rent due by the principal tenant, and that the landlord should be compelled to exhaust his remedy against the tenant. It is a familiar principle of the law that, where two parties are in a situation where one or the other must suffer for the default or act of some third person, and one party has it within his power to prevent, by reasonable means, either party from suffering, and fails to do so, he will be held responsible for the loss which he might have obviated. The right of the landlord to resort to the purchaser of products of the tenant for the amount of his rent, to the extent of the value of the products, arises as an action for the conversion of the property. The court having reached the conclusion in the original case which held such person liable, that it was made a crime by statute to remove the products from the place or premises where they were grown without the consent of the landlord, and that liability arose from such statute; in other words, it did not arise in contract, but from the tort of the purchaser. In all cases of damage it is the duty of the party who is damaged to reduce his damages where it is reasonably within his power to do so. The rule is stated in 13 Cyc. p. 71, par. "k," as follows:

"Where an injured party finds that a wrong has been perpetrated on him, he should use all reasonable means

to arrest the loss. He cannot stand idly by and permit the loss to increase and then hold the wrongdoer liable for the loss which he might have prevented."

We have carefully examined the authorities cited in the briefs, and have made an independent investigation of all available authorities at our command, but have failed to find a case precisely in point. We think, however, that the general principles of law warrant us in holding that the landlord cannot pay to his tenant, who is indebted to him, sums of money in excess of the amount due by the tenant, and thereafter recover the amount due by the tenant from a purchaser of products of the tenant in good faith. Of course, it was not incumbent upon the landlord to employ Norris, and he could not be required to apply any money which would be exempt to Norris to the liquidation of his debts, but he must use reasonable means to reduce his damage, and we think the peremptory instruction should not have been given to the plaintiff, and that the defendant should have had the instructions requested, but refused, and that the cause should have been submitted to the jury on the proper instructions.

The judgment is reversed, and the cause remanded.

*Reversed and remanded.*

---

LONDON GUARANTEE & ACCIDENT CO. v. J. J. NEWMAN  
LUMBER CO.

[77 South. 522, Division A.]

**CONTRACTS. Intent. Body of agreement. Signature.**

Where the body of an agreement shows a personal guaranty by the writer, though he signs the agreement as the agent of another, in such case the body of the agreement controls and not the signature, and the agreement will be held to be the personal guaranty of the agent and not of his principal.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

Suit by the London Guarantee & Accident Company against the J. J. Newman Lumber Company. From a judgment for plaintiff for part of its claim, plaintiff appeals.

This action was begun in the court below by appellant to recover of appellee a balance alleged to be due it on the premium on an employers' liability policy issued by it to appellee on March 31, 1909. Several pleas were filed by appellee, in one of which is alleged the breach of a collateral agreement alleged to have been entered into by appellant with appellee when a similar policy was issued by it to appellee in 1908, by reason of which appellant is indebted to appellee in an amount in excess of that sued for; by another plea, however, an indebtedness of something over two hundred dollars was admitted, and the tender thereof to appellant made. At the close of the evidence, and at the request of appellee, the jury were peremptorily instructed to find for appellant for the amount admitted to be due by appellee, and there was a verdict and judgment accordingly.

Louis V. Clark & Co. are insurance agents, doing business at Birmingham, Ala., and represent a number of fire, accident, and industrial insurance companies, among which are appellant and the Industrial Insurance Company of Birmingham, Ala., neither of which have any connection with the other. Clark & Co. are the managers of appellant's Southern Department composed of the states of Alabama and Mississippi. The Industrial Insurance Company was organized by Louis V. Clark himself, who is also the president and principal stockholder thereof. For a number of years prior to the institution of this suit appellee had been obtaining annually through Clark & Co. two insurance policies, one an employers' liability, and the other a workmen's collective policy; the former indemnifying it for all money paid to employees as damages for injuries suf-

ferred by them on account of appellee's negligence, and the latter indemnifying it for money paid to employees for certain losses sustained by them for which appellee was not legally responsible. Separate written applications were annually made by appellee for each of these policies; both of which would be at times written by appellant, and were so written by it in March, 1906; the policies expiring in March, 1907. The premiums on the policies were based on a per cent of the total amount of wages paid by appellee to its employees during the period of time covered by the policies. When the two policies issued by appellant in 1906 were about to expire, appellee declined to renew them unless the premiums thereon were reduced, whereupon Louis V. Clark went in person to appellee's place of business, and in an interview with L. L. Major, its manager, it was agreed that the employers' liability policy should be written by appellant at the premium rate of eighty cents on each one hundred dollars of wages paid by appellee, and that the workmen's collective policy should be written by the Industrial Insurance Company at the rate of one dollar and seventy cents for each one hundred dollars of wages paid by appellee, making a total rate on the two policies of two and one-half per cent. on the amount of wages paid; Clark promising and for his agency personally guaranteeing that the net amount to be paid the Industrial Insurance Company in premiums would be reduced to such an extent that the total amount paid both companies would not exceed two per cent. of the amount of wages paid its employees by appellee. This reduction was to be brought about in the manner set forth in the letters hereinafter set out. Upon Clark's return to Birmingham he mailed the policies to appellee, the letter inclosing the policy of the Industrial Company being as follows:

"London Guarantee & Accident Company, Limited, of  
London, England. United States Branch: Head  
Office, Chicago, Ill. A. W. Masters, General Man-

ager. Southern Department: Louis V. Clark & Co., Managers, 214-216 North 20th Street, P. O. Drawer 891, Birmingham, Ala. Long Distance Telephone 607.

“Birmingham, Ala., April 10, 1907.

“J. J. Newman Lumber Company, Hattiesburg, Miss.  
—Dear Sirs: No. 10782—Industrial Insurance Co. Inclosed herewith is the above-numbered policy issued in lieu of No. 10728, which you will kindly return to us for cancellation. In connection with the policy inclosed, and B-7723—London Guarantee & Accident Company, covering employers' liability, we wish to say to you that this office personally guarantees that the rate your company will have to pay shall not exceed two per cent. total, and shall be as much less as you can help us to make it by reducing the losses to a minimum and keeping down the hospital and medical charges, which no other company allows, so far as we are aware, in what is known as their workmen's collective policy. At the end of the year, we will give you an itemized statement showing all expenditures including indemnity, hospital and medical charges, and such other items not contemplated by the policy which we may allow, and incidental home office expenses of conducting the business, and this sum total will be subtracted from the sum total of premium and the difference divided equally between your office and our own, which gives you the benefit of our seventeen years' continuous connection as agents and adjusters of losses at the least possible cost. We make this concession confidentially, because it is not, generally speaking, a strictly business underwriting proposition, yet we have had your plant continuously since 1890, and feel that we can make a concession that would be valuable to your interests, especially so since Messrs. Major and Sowers are of so great value in assisting us in the settlement of claims, which keeps our loss ratio down to a minimum, and in consequence think your company should enjoy the benefits. We would not like this to

Statement of the case.

[116 Miss.]

be known among the other milling interests, which pay us largely in excess of your charges, for the reason that we could not afford to make so low a rate where the service rendered by the assured is not of the same degree of intelligence and activity in handling claims promptly. Kindly sign the inclosed application and return, together with policy No. 10726, greatly obliging

“Yours very truly,

LOUIS V. CLARK & Co.

“RS Enc.

Mgrs. So. Dept.”

Upon the expiration of these policies they were each renewed upon written applications therefor, the renewals being mailed by Clark & Co. to Major under the same cover, the letter accompanying them being practically a duplicate of the one hereinbefore set out, by which the industrial policy of the preceding year had been forwarded, and is as follows:

“London Guarantee & Accident Company, Limited, of London, England. United States Branch: Head Office Chicago, Ill. A. W. Masters, General Manager. Southern Department: Louis V. Clark & Co., Managers, 214-216 North 20th Street, P. O. Drawer 891, Birmingham, Ala. Long Distance Telephone 607.

“Birmingham, Ala., April 1, 1908.

“Mr. L. L. Major care of J. J. Newman Lbr. Co., Hattiesburg, Miss.—Dear Sir: 10925—Industrial—B—11350—L. G. & A. Inclosed herewith are the above-numbered policies, issued in accordance with applications a few days since. In this connection we wish to confirm the verbal agreement that our office personally guarantees that the rate your company will have to pay shall not exceed two per cent. total, and shall be as much less as you can help us to make it, by reducing the losses to a minimum and keeping down the hospital and medical charges, and such other charges which we have been paying in the past, not contemplated nor included in the policies, which no other company allows, so far as we aware, in what is known as the workmen’s collective

policy. At the end of the year we will give you an itemized statement showing all expenditures, including indemnity, hospital and medical charges, and other items not contemplated by the policy, which you may allow, and incidental home office expenses in conducting the business. This sum will be subtracted from the sum total of the premium on the workmen's collective policy, and the difference divided between your office and our own. This gives you the benefit of our eighteen years' continuous management and adjustment of your losses, which with your assistance we have been able to keep at a minimum. This concession is made to your company personally on your account, in a confidential way, because it is not, generally speaking, a strictly business underwriting proposition, yet we are glad personally to make this special concession to your company, for the reason that at the rates written we have to regard it more as a sentimental than business proposition. And again, we feel that our losses will be kept down by the excellent management of yourself, assisted by Mr. Sowers, to that point which guarantees safety on the proposition as a whole. . . . Kindly acknowledge receipt, and oblige.

"Yours truly,      LOUIS V. CLARK & Co.,

"ES Enc.

Mgrs. So. Dept."

The premiums due each of these companies on the policies issued by them in 1907 and 1908 were paid according to the stipulations therein and without any complaint on the part of appellee. Prior to the expiration of the policies issued in April, 1908, Major severed his connection with appellee, and when the policies expired in 1909 his successor declined to renew the same on the old basis, and the negotiations between him and Clark & Co. relative thereto resulted in appellant issuing to appellee an employers' liability policy on which the premium to be paid was fifty-five cents on each one hundred dollars of wages paid by it to its employees, and the Industrial Company issuing to it a workmen's collective



policy, on which the premium to be paid was one dollar and twenty-five cents on each one hundred dollars of wages paid by it to its employees. When appellant's policy was issued, the amount of wages that would probably be paid its employees by appellee during the period covered by it was estimated, and a premium based thereon, paid, but at the end of the period it developed that appellee had paid its employees an amount of wages largely in excess of that estimated, resulting in a balance being due by it to appellant of something over one thousand dollars. This it declined to pay, claiming that appellant had guaranteed, when the policies were renewed in 1908, that the combined rate to be paid it and the Industrial Company by appellee would not exceed two per cent. of the amount of wages paid by appellee to its workmen, but that each company had collected the full rate provided by the policies, so that appellee had paid a total rate of two and one half per cent. on the amount of wages paid its employees, from which it follows that appellant is indebted to it in the amount thus overpaid the two companies, which amount exceeds that due by appellee to appellant on the policy written in 1909. Appellant knew nothing of the arrangement made by Clark & Co. with appellee relative to premiums to be paid on any of these policies to the Industrial Insurance Company.

*Stevens & Cook*, for appellant.

*S. E. Travis*, for appellee.

SMITH, C. J., delivered the opinion of the court.

(After stating the facts as above.) Appellee's claim is based altogether upon the second letter written by Clark & Co. to Major, inclosing the two policies issued in April, 1908, and it objected in the court below to the introduction by appellant of the letter written by Clark

& Co. in 1907, inclosing the policy of the Industrial Insurance Company then issued, and also to the testimony hereinbefore set out of the matters which rest in parol. It will be unnecessary for us to pass upon the rulings of the court below on the objections interposed to this evidence, for the reason that the guaranty contained in the letter relied on by appellee from Louis V. Clark & Co. to Major, appellee's manager, that the total premium to be paid by appellant on the two policies enclosed therein "shall not exceed two per cent." (on the total amount of wages paid by appellee to its employees), purports, and consequently must be held, to be the personal guaranty of the agents, and not of their principal, for the body of the letter, and not the form of the signature thereto, must control. *Revolving Scraper Co. v. Tuttle*, 61 Iowa, 423, 16 N. W. 353, 47 Am. Rep. 816; *Leach v. Blow*, 8 Smedes & M. 221; 2 C. J., p. 674, section 327; 4 Elliott on Contracts, section 2834 et seq.

*Reversed and remanded.*

# TOWNES & STURDIVANT v. EDWARD HOLLAND & Co.

[77 South. 525, Division B.]

## 1. SALES. *Delivery. Question for jury.*

Whether under the facts of this case a sale of cotton on the seller's gin platform was with the understanding that the delivery was then complete, so that the cotton was thereafter at the buyer's risk, was a question for the jury.

## 2. SAME.

A custom to draw with the bill of lading attached does not necessarily carry with it the idea that a sale is not complete until this formality is complied with.

## 3. SAME.

Under the facts in this case the fundamental question was as to the intention of the parties and such intention was to be gathered from the course of dealing between the parties of the contract, the acts performed and the language uttered at the time the transaction was had.

APPEAL from the circuit court of Washington county.

HON. SAM J. OSBORN, Special Judge.

Suit by Townes & Sturdivant against Edward Holland & Co. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

*R. B. Campbell*, for appellant.

The rule is so well settled by the many decisions of our supreme court as to when it is proper for the court to give a peremptory instruction to the jury as to how they should return their verdict, that I deem it useless to cite the cases on that point. Suffice it to say that, to my mind, the case of *Moreland v. Newberger Cotton Company*, 94 Miss. 572, is all sufficient to justify the assertion that the court below erred in giving a peremptory instruction for the appellees, and that, because of that error, the judgment of the court below should be reversed. That case and the instant case are on "all fours." They are as similar in their essential facts as any two cases that have ever come under my observation.

Let me repeat, for the sake of comparison, that, in that case, the cotton had been pointed out, examined, sampled and the price agreed on, and the point of contention was as to whether there had been a sufficient delivery of the cotton to pass title to the purchaser; and, inasmuch as it was shown by uncontradicted evidence that a custom existed between the parties, in such cases, to the effect that the seller was to deliver the cotton to the railroad, obtain a bill of lading therefor, and draw for the price with the bill of lading attached, the court below gave a peremptory instruction for the defendant.

In the case at bar, the cotton had been pointed out, marked, examined, sampled and the price agreed on, and the point of contention was as to whether there had been a sufficient delivery of the cotton to pass title to the purchasers; and, inasmuch as it appeared, from the

evidence in behalf of the purchasers (appellees), that the sellers (appellants), were instructed to ship the cotton to Itta Bena, obtain a bill of lading therefor, and to draw on appellees, at Greenville, at three days' sight for the price with the bill of lading attached, and inasmuch as it appeared from the evidence of B. E. Townes, one of the sellers (appellants), that, while nothing was said about attaching a bill of lading to the draft, that was the way he intended to draw for the price, the court gave a peremptory instruction to the jury to find for the defendants (appellees).

Now assuming, for the present, that there was no other evidence affecting the question of delivery, the duties devolved upon the sellers in this case were the same as the duties devolved upon the sellers in the Newburger Cotton Company case. In both cases, the cotton was to be shipped, a bill of lading obtained, and a draft drawn for the price with the bill of lading attached. In the one case, that was to be done because of an existing custom between the parties while in the other, it was to be done because of instructions from the purchaser. In principle, there could be no difference as to the effect of such custom and effect of such instructions. If, therefore, it was error, in the one case, to grant a peremptory instruction for the purchaser, it was error in the other case to do so.

*Percy & Percy*, for appellee.

The question is whether the contract had been completed so as to vest title to the cotton in appellees at the time of the fire. It does not seem necessary to make any elaborate argument on this question under the foregoing facts. The testimony is singularly free from conflict, and the decision of the case rests upon elementary principles of law, and according to those principles there was no complete contract, and the title to the property remained in the vendors.

The basic principles governing a sale of personal property is that when, under the terms of the sale, the buyer has done all he has agreed to do, and the seller has done what he has agreed to do, the sale is complete and title to the property passes, or to state it conversely, as long as there remains anything to be done under the contract by the buyer or by the seller, title does not pass. In the absence of agreement, express or implied, and the decisions usually turn upon either a conflict in the testimony as to such waiver, or whether there has been an implied waiver in the absence of any express agreement deducible from the actions of the parties evidencing their intent. The buyer can waive delivery; that is, he can accept the article where it is located at the time of the trade, and in the absence of a stipulation for a special kind of delivery does, by implication, accept delivery of the property where it is located. On the other hand the seller can part with title to his property and give credit to the buyer, but this must be express contract, or by acts from which such intent may be inferred. In the case at bar the buyer contracted for a delivery to the railroad and the seller contracted for a cash payment. The cotton was not delivered; nothing done towards this delivery, and the price of the cotton was not paid. The two essential elements to a change in title were lacking. There is nothing in the evidence that raises a conflict on these two essential propositions. There is entire unanimity in the testimony that Fordham directed the delivery of the cotton to the railroad. There is nothing to suggest that this was to be done as a matter of accommodation by the seller, or that it was not one of the terms of the sale agreed upon; and under this provision of the contract Townes immediately got busy with the railroad to get cars in order to make a delivery of the cotton.

The cotton was to be paid for before title passed. There is no conflict on this proposition. Fordham testifies that he instructed the cotton to be shipped with three days'

sight draft with bill of lading attached. Townes testified that he does not remember the instruction about attaching the bill of lading, but that the sale was a cash sale, and he intended to attach it, and was interested in getting the bill of lading so that he could attach it to his draft and get paid for his cotton. Is there anything in this testimony which suggests a doubt as to the terms of sale? Anything to indicate that the purchaser intended to waive delivery, or that the vendor intended to part with the title to his property without being paid for it?

Where a sale is for cash, payment precedes the transfer of title, and, until made, title remains in the seller who may, on the buyer obtaining possession without payment, recover possession in trover. *Sharp v. Hawkins*, 107 S. W. 1078; *Howard v. Hess*, 109 S. W. 1076; *French v. Lewis*, 11 L. R. A. (N. S.) 948; 35 Cyc., 169; 35 Cyc., 287; 35 Cyc., 334; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Indiana National Bank v. Colgate*, 4 Daly 41; *Alderman v. Eastern R. Co.*, 115 Mass. 233; Note to 2 L. R. A. (N. S.) 79; see, also, *Greenwood Grocery Co. v. Canadian County Mill & Elevator Co.*, 2 L. R. A. (N. S.) 79, and also note to 2 L. R. A. (N. S.) p. 1079; *Downs v. National Exchange Bank*, 23 Law Ed. 214, and 35 Cyc., 334.

There are no Mississippi cases contravening this recognized principle, the court holding in various cases that where everything has been completed, title to the property may pass without an actual delivery, such delivery not being stipulated for. *Stamps v. Bush*, 7 How 255; *Jordan v. Harris*, 31 Miss. 257; *McKay v. Hamblin*, 40 Miss. 472; *Smith v. Sparkman*, 55 Miss. 652; *Merchants & Manufacturers' Bank v. Toomer Lumber Co.*, 76 So. 565.

Counsel cites *Johnson v. Tabor*, 101 Miss. 78, but apparently places his chief reliance upon *Moreland v. Newberger Cotton Co.*, 94 Miss. 372. The first case merely holds that where a sale of personal property is otherwise complete, delivery between the parties to the con-

tract is not necessary, in order to invest the purchaser with title thereto, unless delivery was required by the contract as a condition precedent to the vesting of the title and the completion of the sale. There is nothing in this case to help appellants. The price agreed upon had been paid, and it was quite evident that the delivery was waived.

But counsel thinks that the latter case is on all fours with the case at bar, in fact he assures the court that the cases in their essential facts are as similar as any two cases which have come under his observation. We assure the court that in their essential facts, that is, in the facts the construction of which are essential to a proper determination of the two cases, there is no similarity. The very difference in the facts makes a peremptory instruction improper in the one case and proper in the other.

Cook, P. J., delivered the opinion of the court.

Townes & Sturdivant, appellants, sold to Edward Holland & Co., appellees, who were cotton buyers at Greenville, Miss., one hundred and eighty-four bales of cotton lying on appellant's gin platform at Glendora, in Tallahatchie county, Miss. The sale was made in the afternoon of September 21, 1916, between two and three o'clock. At eleven o'clock that night one hundred and twenty-seven bales of said cotton were destroyed by fire, and afterwards the fifty-seven bales not destroyed were delivered to appellees and paid for by them. Appellees refused to pay for the cotton destroyed, and thereupon appellants brought this suit to recover the price of the destroyed bales. Appellees pleaded the general issue; and at the conclusion of the evidence the court, at their request, gave a peremptory instruction to the jury to return their verdict for the appellees.

The disputed point in issue was the delivery of the cotton. The court was evidently of the opinion that the evidence, taken as a whole, shows that the sale was in-

complete. The cotton was on the gin platform of appellants lying between the track of the Yazoo & Mississippi Valley Railroad Company on one side and the Southern Railroad Company on the other side. The cotton was numbered and marked, and it had been sampled and graded by appellees' agent, and he, together with other bidders, submitted sealed bids, all of which were rejected by appellants. Appellee's agent on the ground called up appellees on the telephone and reported the facts to appellees' manager at Greenville, giving the number of bales, the grade, staple, and the price he had offered, which had been declined. The manager Mr. Fordham, then had a conversation over the phone with B. E. Townes, a member of appellants' firm. This conversation finally resulted in a sale of one hundred and eighty-three bales of the cotton at twenty-five cents per pound and one bale at twenty-two and one-half cents per pound. Both Fordham and Townes testified about the substance of this conversation, and they only differed about the method of shipment and payment. Townes said the sale was then and there completed, and that Fordham instructed him to ship the cotton to the Itta Bena Compress for appellees' account and to draw on appellees a three days' sight draft for the price. Fordham's version of the conversation was that he instructed Townes to ship the cotton, and to draw on appellees at Greenville a three days' sight draft for the price, with bill of lading attached. Townes said that, if anything was said about attaching the bill of lading, he did not hear it, but he further stated that he intended to draw with bill of lading attached, because, he said, no cotton buyer would pay a straight draft without bill of lading attached. It will be observed that there was no substantial difference between the witnesses as to the facts.

Mr. Townes testified that on the day after the fire appellees phoned him to confirm the sale of the cotton,



and in response to this request he wrote the following letter, dating it on the day of the sale and fire, viz.:

“Glendora, Miss., Sept. 21st, 1916.

“Edward Holland & Co., Greenville, Miss.—Gentlemen: This is to certify that we confirm sale made over phone to-day for one hundred and eighty-three bales of cotton, at twenty-five cents per pound and one bale of cotton sold to your buyer, Mr. Dave Humphrey, at twenty-two and one-half cents per pound.

“Yours very truly, TOWNES & STURDIVANT.”

The record shows that appellees, on the day after the fire, wrote this letter to the Standard Marine Insurance Company:

“Sept. 22, '16.

“J. W. Roberts, Mgr. Standard Marine Ins. Co., 63 Beaver St., New York, N. Y.: Just heard one hundred twenty-four bales burned. Sixty bales badly damaged, consisting of purchase one hundred eighty-four bought yesterday afternoon from Sturdivant & Townes at Glendora, Mississippi. How shall we act in the matter?

EDWARD HOLLAND & Co.”

On the same day, this letter was written to Townes & Sturdivant, viz.:

“Greenville, Miss., Sept. 22, '16.

“Messrs. Sturdivant & Townes, Glendora, Mississippi—Dear Sirs: As we will have the Standard Marine Co.’s representative at Glendora Monday, we will ask you to send us in an invoice made up from your gin weights of the one hundred and eighty-four bales burned. Kindly do this at once and give us all particulars about the fire. Thanking you for your trouble.

“Yours truly, EDW. HOLLAND & Co.”

Inasmuch as the trial court instructed the jury peremptorily to find for the defendant, the whole record and all of the evidence offered and excluded, as well as the evidence sought by the plaintiff, comes under review.

The narrow point, the single point, presented by this appeal, is the question of delivery. This court in *More-*

*land v. Cotton Co.*, 94 Miss. 572, 48 So. 187, propounded this question and gave the answer thereto, viz.:

“Might I not agree with a purchaser to take my chattels at an agreed price, with the express understanding that delivery was then completed, but further agree to prepare them for shipment and wait for payment until the bill of lading is issued? To propound this query is to answer it.”

We have examined this record in its entirety, and in the light of the principles announced in *Moreland v. Cotton Co.*, *supra*, it seems clear that this was a case for the determination of a jury. The jury might have reasonably concluded that the sale of the cotton was complete.

“The fundamental question here is as to the intention of the parties, and this intention is, of course, to be gathered from the course of dealing between them, the acts performed, and the language uttered at the time the transaction is had.”

It will be noted that one of the judges in the *Moreland Case* thought that a peremptory instruction should have been given for the plaintiff.

This case, if not “on all fours” with the *Moreland Case*, is certainly strikingly similar, and is controlled by the principles announced in that case. The jury would have been warranted in believing that the sale was completed; that the cotton had been delivered, and was, at the time of the fire, the property of appellees, and to execute the contract the payment of the agreed price was the only thing left undone.

The letters of appellees to the insurance company were pertinent, as tending to show their understanding of the transaction, and were in accord with the contention of plaintiffs. It is manifest that Townes & Sturdivant thought they had sold the cotton, and a jury would be warranted in believing that the defendants were of opinion that they owned the cotton, else why should they have corresponded with the insurance company? The trial

judge erred in excluding evidence which might have influenced the jury in arriving at a verdict.

We do not think that a custom to draw with the bill of lading attached necessarily carries with it the idea that a sale is not complete until this formality is complied with. The question is at last, in all cases wherein contracts of sale are involved: What was the understanding of the parties to the transaction? Viewing the contract in the present case from the standpoint of appellants, we are unwilling to say that the sale was not complete because the cotton had not been delivered to the carrier. It seems reasonable to say, from all the evidence admitted and excluded, that the trade was closed, and the title to the cotton was vested in the buyer. The sale was executed, and the only thing left undone was the payment of the agreed price.

In the numerous cases reported in the books the decisions rest upon the facts of each case. We think the facts in this case are very near akin to the facts in *Moreland v. Cotton Co.*, *supra*, and the court should have submitted the facts to the jury to determine the intention of the parties. This court, in *Moreland v. Cotton Co.*, said:

"So that we can find no justification for the peremptory instruction in defendant's favor except the custom shown to exist between the parties as to payment and placing the cotton in the possession of the railroad company for transportation. We think this is a delicately balanced question."

So say we in this case.

*Reversed and remanded.*

---

HARVISON v. TURNER.

[77 South. 528, Division A.]

1. JUDGMENTS. *Res judicata. Issues not decided.*

Even though the relief sought in a second suit may be different from that asked in the first suit, yet where the causes of action are substantially the same the question is *res judicata*.

116 Miss.]

Brief for appellant.

## 2. SAME.

Where the pleadings in a case present issues involved in such case, which might have been litigated therein, as well as those actually litigated, they are *res judicata*.

## 3. SAME.

All issues which under the pleadings, might have been decided in a suit, are *res judicata*, whether they were litigated or not, and even though the court failed through inadvertence or mistake to pass on some of the issues.

APPEAL from the chancery court of Perry county.

HON. W. M. DENNY, JR., Chancellor.

Bill in equity by L. E. Turner against W. D. Harvison. From a decree overruling a demurrer to the bill, defendants appeal.

The facts are fully stated in the opinion of the court.

Q. S. Heidelberg and Hannah & Foote, for appellant.

We, respectfully, submit that the questions involved in this record are the same identical questions that were involved in the case of *Harvison v. Turner* in the chancery court of Perry county and that the adjudication of said case precludes the right of appellee here.

The doctrine of *res judicata* as laid down in 23 Cyc., 1215, is: "A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment there in so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties and privies, in the same court or in any other court of concurrent jurisdiction upon the same or a different cause of action."

A reference to the pleadings in the cause of *Harvison v. Turner*, and the pleadings in the case at bar shows that the only difference in parties in these cases is that the wife of Harvison is a party to the former pro-

ceedings. The pleadings reflect that she has no interest in the controversy and that within the meaning of the rules laid down as to former adjudication, the parties in these two proceedings are identical.

An analysis of the pleadings in these two cases reflects that the facts and cause of action therein stated are practically the same and identical and we submit that because the relief asked in one is different from relief asked in the other does not relieve the appellee from the burden of the former adjudication. 32 Cyc., pages 1168-9.

The above rule is supported in Mississippi by the case of *Burkett v. Burkett*, 81 Miss. 83, 33 So. 417.

Even if it be admitted that this identical point was not directly passed upon, or adjudicated, we still submit that appellee is bound by the judgment in said case. 23 Cyc., 1170.

The above doctrine is supported in Mississippi by the case of *Hubbard v. Flynt*, 58 Miss. 266, in which case it is said, page 270: "There is no distinction between this and the matter involved, in the record of the former case, and which being so involved, might have been litigated and decided, and which is held to be a matter adjudicated because it might have been." The above doctrine is supported by *Stewart v. Stebbens*, 30 Miss. 66.

The law as laid down in *Hubbard v. Flynt*, is cited with approval in the case of *Hardy v. O'Pry*, 102 Miss. 197, 79 So. 73. But even conceding that the issues are not the same, and conceding that the relief asked in the two is not the same, yet we submit that the appellee is bound just the same. 23 Cyc., 1169.

In the consequence we submit that the trial court erred in overruling the demurrer; that the same should have been sustained and the bill of complaint dismissed.

*Stevens & Cook*, for appellee.

The controversy in the first suit, was over the note and the question of its payment or non-payment, and the

court was necessarily confined to the determination of that particular controversy, and the decree rendered adjudicates that the note was paid, as contended by Harvison, and that the lien securing it upon the records therefore ought to be cancelled and Turner denied a decree for any balance on the note itself. Turner was suing in his cross-bill, as above indicated, for an alleged balance due on a promissory note. Now in the case before the court, the present suit, he is suing for timber which he alleges Harvison cut and sold through the Jeff Griffis Mercantile Company after he had sold the selfsame timber standing on the land to Turner in settlement of the said note. The cause of action in the former suit and in the latter suit are entirely different. The case of *Hardy v. O'Pry*, 102 Miss. 197, cited by counsel for appellant is absolutely conclusive against appellant in this suit.

The court in the case just cited, says: "It is true those things which might have been litigated, as well as those things actually litigated in the first suit are *res judicata*; but this means those things "involved in the record of the former case, and which, being so involved, might have been litigated and decided," etc. *Hubbard v. Flint*, 58 Miss. 266. And, moreover, when the cause of action in the two suits is different only those things are concluded by the first judgment which were actually in issue in the suit in which it was rendered. *Scully v. Lowenstein*, 56 Miss. 652; 23 Cyc., 1297; 24 Am. & Eng. Ency. Law (2 Ed.), 782."

There is no merit in the contention of counsel for appellant that: "If it is to be considered independent of said transaction the proper forum for appellee here was to the circuit court on a charge of trespass and we submit that he has neither right nor remedy in this court."

It will be borne in mind by the court in considering this contention of counsel, that the bill of complaint not only seeks a decree against Harvison for the appropri-

ation of Turner's timber but seeks to have Turner subrogated to the lien of the Jeff Griffis Mercantile Company under its trust deed, which deed of trust was satisfied as to the Jeff Griffis Mercantile Company only by the appropriation thereto of the proceeds of Turner's timber. The remedy of subrogation and the prayer therefor gives the chancery court jurisdiction, and especially so since the bill of complaint further shows that Harvison is insolvent and that Turner is without remedy unless he is subrogated to the Jeff Griffis Mercantile Company's deed of trust on the Perry county land. Counsel for appellant make no contention that we do not make out a proper case for subrogation if we have a claim against Harvison which was not adjudicated in the former suit. They rely upon the defense of *res adjudicata* only.

We submit that the learned chancellor below was correct in his decree overruling the demurrer in this case and that the decree should be affirmed.

SYKES, J., delivered the opinion of the court.

The appellee here, L. E. Turner, complainant in the lower court, filed an original bill in the chancery court of Perry county against W. D. Harvison. The bill, in substance, alleges that Turner sold to Harvison some land in Green county for the sum of three thousand dollars; that to secure the payment of the purchase price, appellant Harvison gave his note for the purchase price, three thousand dollars, payable three years after date. A vendor's lien was reserved in the deed to the land in Green county. Harvison and wife, also to secure the payment of the note, executed and gave a deed of trust on some timber on lands owned by them in Perry county. Subsequent to the execution of the deed of trust on the standing timber on the lands in Perry county, Harvison gave a deed of trust upon the land and the timber in Perry county to the Jeff Griffis Mercantile Company, to secure an indebtedness of five

hundred dollars. The bill further alleges: That after the execution of this second deed of trust the mercantile company, acting for Harvison, induced the appellee, Turner, to release and cancel his lien upon the timber in Perry county upon the payment to Turner of two hundred dollars by the mercantile company. This payment was made, and a credit for this amount was given on the three thousand dollar note of appellant. That after the appellant, Harvison, had procured through the mercantile company a cancellation of appellee's deed of trust, he entered upon the lands in Perry county and cut all the remaining merchantable timber and sold it through the mercantile company for the sum of seven hundred and fifty dollars, and applied this sum to the payment of the mercantile company's deed of trust. The bill further alleges that the timber in Green county was sold by Harvison to the Richton Lumber Company for the sum of one thousand dollars, and this one thousand dollars was paid to appellee, Turner, and credited by him on the note for three thousand dollars, the two sums for which the timber had been sold on the lands in Green and Perry counties making a total of one thousand two hundred dollars paid on the note through the sales of timber, and leaving a balance due appellee Turner of one thousand, two hundred and ninety-four dollars and ninety-two cents. The bill then sets up the history of a previous litigation between these same parties in Perry county. In that bill the appellant, Harvison, was the complainant, and appellee, Turner, defendant. The original bill, answer, and cross-bill, answer to cross-bill, and decree in the Perry county case are all made exhibits to the original bill in this case. It is then averred that the chancery court of Perry county, in the first suit in which Harvison was complainant, found and decreed that Turner became the owner of the timber in Perry county by purchase from the defendant. It is then alleged that appellee, Turner, never sold or parted with the title to the timber, which the court in Perry county had held that he had acquired from the appel-



lant, and that the appellant had entered upon the lands in Perry county and cut and removed the timber, and that the appellee, Turner, is entitled to recover the value of said timber, which amounts to about one thousand dollars.

It is alleged that Harvison owns no property except the tracts of land in Green and Perry counties; that the Green county land is a homestead and exempt from execution. It is alleged that the Perry county lands had been relieved of the deed of trust of the mercantile company solely by the sale of the timber on the lands through this company and the application of the proceeds of the sale to the payment of its deed of trust; that Harvison is trying to sell the Perry county lands or to secure a loan by mortgaging them; that if either is done, Turner would be without remedy on account of the insolvency of Harvison. It is then alleged that Turner is entitled, not only to a decree against the defendant for the value of the timber cut by him from the Perry county lands, but is entitled to be subrogated to the lien of the deed of trust of the mercantile company. The prayer is for this subrogation and a decree for the value of the timber so cut and removed from the Perry county lands by Harvison.

To this bill of complaint a demurrer was interposed by Harvison, in which it is alleged, among other things, that the bill and exhibits show that all the matters alleged in the bill were adjudicated in the first litigation in the chancery court of Perry county. The chancellor overruled the demurrer, and from that decree this appeal is prosecuted.

It therefore becomes necessary for us to set out in substance the material allegations and denials contained in the bill and answer in the first Perry county litigation, and also the decree in that case, from which no appeal was prosecuted, in order to determine whether or not the issues presented by the bill were or should have been adjudicated.

In the original bill filed by Harvison and wife in the chancery court of Perry county, the history of the purchase of the lands in Green county, the reservation of a vendor's lien on said lands, and the giving of a deed of trust on the timber in Perry county are all set forth in detail, and admitted by Turner, the defendant in that suit. The bill then alleges in great detail facts which led up to Harvison selling to Turner all of the merchantable timber on the Green and Perry county lands for the amount due to Turner by Harvison, and that Turner bought the timber for the balance due him and agreed to cancel the vendor's lien in Green county and the deed of trust on the timber in Perry county; that Turner was to execute a new deed to the Green county land, freed of the vendor's lien; that in pursuance of this agreement, Turner entered upon the Perry county lands, cut down and removed, sold and converted into money, most of the timber on this land, and that he (Turner) sold the remainder of the timber to the Jeff Griffis Mercantile Company and executed to said mercantile company a writing duly conveying this timber. It is then alleged that Turner "cut and removed from the said lands in Perry county under the aforesaid contract and agreement, within sixty days, or within a short time from the time of making said contract for the sale of all of the said timber to him, all the merchantable timber thereon except a small part, and that he sold and conveyed the remainder thereof to the Jeff Griffis Mercantile Company and received pay therefor, and that defendant has gotten off and received pay for all of the merchantable timber being on the aforesaid lands in Perry county." The bill then alleges that Turner sold the timber on the land in Green county. It is then alleged that Turner failed to deliver to Harvison the three thousand dollar note and the new deed to the land in Green county, and failed to cancel the deed of trust in Perry county. It is then alleged, a third time, that Turner went upon the lands in Perry county and cut

and removed and sold therefrom nearly all of the merchantable timber thereon and sold and conveyed the remainder thereof. It is also then alleged that the deed of trust on the timber in Perry county has become extinguished by the payment as above set out, and should be canceled.

The answer of Turner denied that he purchased the timber on the lands in Green and Perry counties, as specifically averred in the bill. It denies that Turner entered upon the land in Perry county and cut down and removed and converted into money most of the timber. Denies that he cut and removed any timber on the Perry county lands. Denies that defendant executed to the Jeff Griffis Mercantile Company a writing conveying the balance of the timber on the Perry county lands. In short, the answer in detail denies the material allegations as to the selling, cutting, and removing of the timber on the lands in both Green and Perry counties. Denied that the note had been paid, but averred that a balance of one thousand, two hundred ninety-four dollars and ninety-two cents was due. It avers that complainant and defendant entered into an agreement that certain timber was to be cut and the proceeds from the sale of same applied as a credit on the note; that Turner agreed to relinquish his prior lien on the Perry county land, provided the mercantile company would pay Turner two hundred dollars to be applied on this note; that this arrangement was made in the interest of Harvison. Denies that he promised, while the timber was being cut on the Perry county lands, that he would deliver the three thousand dollar note to Harvison. The cross-bill of Turner alleges, in short, that Harvison made arrangements with certain parties whereby he sold the timber to them in these counties, and that the net proceeds of this timber was to be applied on the three thousand dollar indebtedness, and that Turner agreed to this arrangement, and that certain payments were made and credited on the note,

leaving a balance due of the amount above set out; that this arrangement was only partially carried out. The cross-bill prays that the court decree that Harvison and wife are indebted to Turner in the sum of one thousand, two hundred ninety-four dollars and ninety-two cents, and that this indebtedness is a lien upon the lands in Green county, and that if the amount due be not paid, the lands be condemned and sold, and for general relief, etc. The decree of the court shows that the case was heard upon pleadings and oral testimony, and it was decreed that the complainants, Harvison and wife, were entitled to the relief prayed in the original bill; that the promissory note of three thousand dollars had been paid and settled in full and that nothing remained due or owing thereon to Turner, and that said note be canceled and the vendor's lien on the Green county land be canceled. It was further ordered that the deed of trust on the timber in Perry county be canceled and set aside. The decree did not find that Turner owned the timber on either tract of land at that time.

It is the contention of the appellee, Turner, that the only issue presented in the first suit was whether or not Harvison had been paid the balance due on the Green county lands by sale of the timber on the Perry and Green county lands to Turner, and that the court by decreeing that the note had been paid necessarily held that it was paid by the sale of this timber to Turner, and that therefore Turner was the owner of the timber, and that Harvison was liable to him for the value of any timber sold from these lands by Harvison after the sale of the timber by Harvison to Turner. We think this is entirely too narrow a view to take of the issues in the first case. It was not only alleged in the original bill filed by Harvison and wife that these notes had been paid and settled by a sale of the timber to Turner, but it was further alleged that Turner himself had cut and removed most of the timber from the

Perry county lands and had sold the remainder of the timber to the Griffis Mercantile Company. In other words, the bill alleged, by the removal of most of the timber by Turner and the sale of the balance of it by Turner to Griffis, in effect, that Turner had thereby parted with any right or title, or with all right or title, held by him to this timber on the land in Perry county. These allegations of the bill were specifically denied in the answer. There was not only an issue as to whether or not the purchase price of the Green county lands had been paid, but also an issue as to the title of and equities in the timber in both Green and Perry counties. These issues were clearly made in the pleadings. The chancellor was called upon in that case to pass upon the question as to whether or not Turner had any interest, either as beneficiary in a trust deed, as owner, or any other equitable interest, in the Perry county timber. If he had so found, then he should have protected this interest of Turner in his decree. We are of opinion that this question was actually and directly in issue in the first suit, and therefore that it cannot be relitigated here. 23 Cyc. 1215. Even though the relief sought may be different from that asked in the first suit, yet where the causes of action are substantially the same, the question is *res judicata*. 23 Cyc. pp. 1168-1170; *Burkett v. Burkett*, 81 Miss. 593, 33 So. 417; *Hubbard v. Flint*, 58 Miss. 266. Where the pleadings in a case present issues involved in said case which might have been litigated therein, as well as those actually litigated, they are *res judicata*. *Hardy v. O'Pry*, 102 Miss. 197, 59 So. 73. It would therefore follow that, even if the lower court in the first case, through inadvertence or mistake, failed to pass upon the title and equities to the timber in Perry county, since it was a matter in issue in the pleadings and proper to decide in order finally to dispose of the litigation between these parties, by the decree it became *res judicata*. We therefore hold that the question presented in the pres-

ent bill was an issue and was decided in the first Perry county suit, and is therefore *res judicata*. It was error in the court below to overrule the demurrer of appellant.

*Reversed and remanded.*

FOLSOM ET AL. v. ILLINOIS CENTRAL RAILROAD COMPANY.

[77 South. 604, Division B.]

1. RAILROADS. *Fire from locomotives. Laws 1912, chapter 151.*

Since the enactment of chapter 151, Laws 1912, a railroad company is "responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated, directly or indirectly, by locomotive engines in use upon the railroad," and has "an insurable interest in the property upon the route of the railroad." This statute imposes liability regardless of negligence.

2. SAME.

Under the facts as set out in its opinion in this case the court held that the evidence was sufficient to show that the fire was caused by sparks from defendant's locomotive.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Bill by Henry Folsom and others against the Illinois Central Railroad Company. Bill dismissed and plaintiff appeals.

The facts are fully stated in the opinion of the court.

G. L. Teat and J. A. Teat, for appellants.

Since the chancellor found that the property of the complainants was totally destroyed by the fire set out by sparks emitted from defendant's locomotives, the judgment and decree must be for the complainants.

Under Law 1912, chap. 151, in effect March 7, 1912, which reads as follows to wit: "That each railroad corporation owning or operating a railroad in this State shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated, directly or indirectly, by locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned and operated by it and may procure insurance thereon in its own behalf for its protection against such damages."

"That this act shall take effect and be in force from and after its passage. Approved March 8, 1912."

We have carefully read the case of *Miss. Home Ins. Co. v. Louisville, New Orleans & Texas Railroad Company*, 70 Miss. 119, and the exhaustive opinion of Judge COOPER. Also the case of *Tribbette v. Illinois Central Railroad Company*, 71 Miss. 121, and the carefully written opinion of Judge Woods, and note the law of negligence laid down in these cases. But the legislative mandate has changed it and changed it most materially. The word "negligence" does not appear in Chap. 151, Laws 1912. The question of negligence no longer exists.

The spark arresters of the "most improved make," and "in good order at the time," the "competent and skilled employees in the exercise of due care and caution," is no longer a defense to a fire caused by the engines of a railroad.

The law now is that if damage is caused by fire communicated from the engines operated on a railroad's tracks, it is liable therefor. It is no longer a question of negligence. This defense is no longer to be heard. The act of communicating the fire by the operation of the engines on the tracks of the railroad fixes and determines the liability.

The case of *Drake v. Y. & M. V. Railroad Company*, 79 Miss. 84, no longer has any application and the statute goes beyond the broad opinion of Judge WHITEFIELD in his opinion in the case of *A. & V. Railroad Company v. Barrett*, 78 Miss. 432. Property damaged or destroyed by fire communicated directly or indirectly by locomotive engines in use on the railroad, etc.

The statute is indeed a broad one, but the wisdom of it cannot be questioned. What right have I to burn up your property, provided I have certain "spark arresters" certain competent and skilled servants?" Is the loss any less to you? I have nevertheless destroyed your property. I have injured you. Can I say that the manner in which I have carried on my business with the fire and engines give me any right whatever to destroy your earnings? No, the question of my negligence by this wholesome statute is entirely eliminated. The act of destroying your property by my fire is the question. I have not any right to destroy your property with the fire from my furnaces, and if I do, I must restore the damage to you.

The chancellor found the fact to be that "The fire which destroyed the house and its contents, the property of the complainants, was set out by the sparks which were emitted from one of defendant's locomotive engines."

With this finding of fact, the judgment and decree should have been in favor of complainants.

*Wells, May & Sanders*, for appellee.

Unless this court is prepared to say that the decree of the chancellor is manifestly wrong on the facts, and that there was no evidence in support of this finding, the decree of the court below must be affirmed. As to the evidence, the chancellor was required to discharge the duty of a jury and it has many times been held by this court, that the findings of the chancellor of the facts will no



more be disturbed on appeal, than would be the verdict of a jury in the same state of the case. *Coffee v. Coffee*, 24 So. 262; *Interstate Cattle Co. v. Lapsley*, 24 So. 532; *Clifton v. Clark & Co.*, 48 Miss. (1902) 795, 37, So. 747; *Simmons v. Hutchinson*, 81 Miss. (1902) 351, 33 So. 21; *Deredyn v. Donovan*, 81 Miss. (1902) 696, 33 So. 73; *Simmons v. Hutchinson*, 81 Miss. (1905) 351, 33 So. 21; *Melchoir v. Kahn*, 38 So. (1905) 347; *Doleman v. White*, 38 So. (1905) 336; *Donald v. Cardwell Mach. Co.*, 38 So. (1905) 1039; *Ladnier v. Steward*, 38 So. (1907) 748; *Gross v. Jones*, 89 Miss. (1910) 44, 42 So. 802; *Moyse v. Howie*, — Miss. —, 53 So. 402.

There are no errors of law assigned and none to be considered on this appeal.

In the brief on file for the appellants, counsel have something to say about chapter 151 of the Laws of 1912, and the radical effect of that chapter on the result of fires which may be caused by the operation of locomotives on railroads, but we submit that upon reading the decree of the court below, it will be seen that the said statute was not in any manner involved, and there was no failure on the part of the chancellor to give it full force and effect, and that the decree in this case does not call for any construction of that statute by the court.

It will be observed that in the first section of the decree, the chancellor found as a fact only this and nothing more; that at the close of the testimony offered on behalf of the complainants a *prima-facie* case had been made by that evidence; that the fire which destroyed the house and its contents was set out by sparks emitted from one of the defendant's locomotives. That was all, and if no other evidence had been produced, he would have rendered a decree in favor of complainants, in accordance with the requirements of chapter 151 of the Laws of 1912.

Complainants' case, and the burden which they assumed when the original bill was filed, was to prove

by the preponderance of the evidence, that the fire which destroyed their property, was caused by the operation of the locomotive of the defendant railroad company. In the second section of the decree the chancellor found that at the close of all of the evidence in this case, the complainants had failed to make out their case by the preponderance of the evidence, and legal burden of proof not having been sustained, the complainants had no right to recover, and the bill was dismissed.

What was complainant's case? It was to prove by the preponderance of the evidence that the fire which destroyed their property was set out or caused by the defendant. What has chapter 151, Laws of 1912, to do with the case, unless and until it first be proved that defendant caused the fire? Certainly counsel for appellants do not wish to be understood as maintaining that the statute relieves the complaining litigant of the burden of proving the basic fact in his case, viz., that the fire was caused by the operation of the defendant's locomotive. But counsel in their brief say in capital letters, that the chancellor found the fact to be: "The fire which destroyed the house and its contents, the property of the complainants, was set out by the sparks which were emitted from one of defendant's locomotive engines." This is just precisely what the chancellor did not find.

The decree states specifically, that altogether complainants proved sufficient evidence to justify such a finding, if it was not disputed. But that upon the whole evidence, at the end of a completed trial, the complainants had failed, "to make out their case by the preponderance of the evidence."

STEVENS, J., delivered the opinion of the court.

Appellants, as complainants in the court below, filed in this case their bill in equity to recover the value of a dwelling house and its contents alleged to have been

burned by fire set out by the locomotives of the defendant company. For reasons immaterial to the present inquiry the suit was instituted in the chancery court. The bill was answered, testimony taken for both parties, and a final decree was rendered by the chancellor dismissing the bill. The decree rendered by the chancellor has two main paragraphs or divisions. In the first portion of the decree the chancellor finds from the testimony offered on behalf of the complainants that:

"It had been sufficiently established, *prima facie*, by substantial evidence, that the fire which destroyed the house and its contents, the property of the complainants, was set out by sparks which were emitted from one of the defendant's locomotive engines passing said point about the hour of seven-thirty p. m., and for that reason, at the close of the complainant's testimony when a motion was made by the defendant to exclude the testimony, the said motion was by the court overruled."

In the second division of the decree the chancellor finds that the "*prima-facie* case made by complainant's witnesses was met and overcome."

Without commenting in detail upon the force or weight of the testimony, we are led to the conclusion that the final decree appealed from is against the evidence in the case and should be reversed. As we construe the facts, the chancellor was manifestly wrong. Since the enactment of Chapter 151, Laws of 1912, the defendant company is "responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated, directly or indirectly, by locomotive engines in use upon the railroad," and has "an insurable interest in the property upon the route of the railroad." This statute imposes liability regardless of negligence; and the sole inquiry, then, is one of fact; that is, whether the house here sued for was in fact destroyed by fire "communicated directly or indirectly" by the defendant's locomotives. It is doubtful whether the chancellor applied the statute in

this case. In one portion of the decree the chancellor finds the facts to be that the fire was set out by sparks emitted from the defendant's locomotive. He then finds that the *prima-facie* case made for the complainants has been overcome by the testimony for the defendant. The testimony offered by the defendant was directly chiefly to the proposition of negligence. The engineers in charge of the locomotives of the defendant were put upon the stand, and testified that their engines were handled with care, that the locomotives were in good condition, and were properly equipped with spark arresters. This was competent testimony, but, as we see it, did not sufficiently overcome or meet the case as made for the complainants. The case is strikingly similar to that of *Richland Planting Co. v. Y. & M. V. R. R.*, 113 Miss. 154, 74 So. 126. As stated by the court in the case referred to:

"There was no source or cause from which the fire could have come except the locomotive. There were no fires in or about the building, and there had been none from which the building could have been set on fire for several hours before that time. The blaze could not have started from a smoldering fire in the ceiling, sometimes caused by defective flues, because the proof shows that the fire here started on the outside of the roof and must have come from an outside source."

That is the situation here. The house was an old one, with a board roof. It was burned about seven-thirty p. m. on an April evening; the house at that time was unoccupied, and there had been no fire in the house that afternoon. The fire originated about halfway up on the side of the roof next to the railroad right of way. Witnesses for the complainants first observed a very small blaze on the roof, and there was a sufficient breeze to fan this rapidly into a consuming fire. The proof indicates no agency except sparks from defendant's locomotives. The house was situated upon the right of

way near where loaded trains stopped to take on coal and water.

The proper order, we think, is one remanding the case for a new trial.

*Reversed and remanded.*

---

NEWTON OIL MILL v. SPENCER.

[77 South. 605, Division B.]

1. TRIAL. *Instructions. Matters admitted.*

Where in a suit by a servant against the master for damages caused by falling through a trap door, the master admitted the dangerous condition of the door and based its defense upon the theory that the servant was cautioned not to get upon it. In such case an instruction for the plaintiff that the door through which plaintiff fell was inherently dangerous did not constitute error.

2. APPEAL AND ERROR. *Harmless error. Instructions. Contributory negligence.*

In such case an instruction that the master must prove by a preponderance of the evidence that the servant had notice of the dangerous condition of the trap door through which he fell, was not prejudicial to the master's rights, since such instruction merely told the jury that the burden was upon the defendant as to contributory negligence.

3. WITNESS. *Privileged communications. Physicians.*

The testimony of a physician who attended plaintiff after his injury was properly excluded on plaintiff's objection.

APPEAL from the circuit court of Newton county.

HON. J. D. CAR, Judge.

Suit by Alonzo Spencer against the Newton Oil Mill. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*Byrd & Byrd*, for appellants.

Instruction number one is clearly and manifestly wrong. We cannot understand how counsel or the court

116 Miss.]

Brief for appellants.

got it into their minds that a door placed in the floor as this one was was inherently dangerous. We do not understand how an inanimate thing can be inherently dangerous, and for that reason we are forced to the conclusion that the instruction is erroneous. It is erroneous, because the court tells the jury that as a matter of fact the plaintiff did fall through the door; and further tells them that, if he did fall through the door, then they must find for plaintiff. Now we do not think, under the facts of this case, that the jury was compelled to find for the plaintiff. This instruction, in effect, is a peremptory instruction.

The second instruction given for plaintiff which is assigned as error was clearly wrong in that it placed the burden upon defendant to show by a preponderance of the evidence that the plaintiff had knowledge of the condition of the door; and it is further erroneous because it assumes that as a matter of fact plaintiff fell through the door, which is not borne out by the proof. The proof is that he stepped upon the door and fell, and the door flew up and hit him in the side, and that was the cause of his injuries, and not that he went through the floor. The falling through the door did not cause his injuries; in fact he didn't fall through, but fell across, and the corner of the door struck him in the side.

The court refused to permit Dr. Cooper to testify as to plaintiff's injuries. Cooper was the physician who first attended plaintiff and who visited him some four or five times, and knew all about, or more than any one else, the extent of the injuries, if any, sustained by the plaintiff. Cooper was the company's physician. We are aware of the rule that a physician cannot testify to matters and things ascertained or learned while attending upon a patient, if the patient objects. But under the peculiar circumstances of this case, we think the law would permit Cooper to have testified. The court will observe that Cooper attended this party as a physician from a few minutes after he was hurt until he was able to get out

and about. After he had gotten up, and able to travel, he went over to Lawrence and saw Dr. Monroe, who made a casual examination of him. Plaintiff introduced Dr. Monroe who undertook to tell the condition and the extent of plaintiff's injuries. It is clear from his testimony that he could tell nothing about it and the substance of what he said is what the plaintiff told him. It seems to us that it would be just and fair that all the facts should be revealed to the jury. Cooper, who knew all the facts, was not permitted to testify. Monroe, who did not know the facts, and could not have known them, was permitted to testify. Both being physicians, one attended him a few minutes after the accident, and until he was practically well; and the other saw him some six weeks after the injury occurred and after he was able to travel.

For the foregoing reasons, we respectfully submit that this case should be reversed.

*J. D. Jones and S. J. McLaurin*, for appellee.

Appellant complains of two instructions of the court and of the fact that Dr. Cooper was not allowed to testify. The first instruction complained of is that the court instructed the jury that the trapdoor through which the appellee fell was inherently dangerous, the "inherently" seeming to be the part of the instruction complained of. Webster gives as his definition of the word "existing in something" or naturally pertaining to something." Under this definition we submit the door was inherently dangerous as was testified to both by the witnesses for appellant and appellee and as stated in appellant's brief.

The next instruction complained of is that which instructed the jury that the burden of proof of contributory negligence was upon the appellant. In an action for personal injuries the burden of proof of contributory negligence is on the defendant. *Sims v. Forbes*, 86 Miss.

412; *Mississippi Central R. R. Co. v. Hardy*, 88 Miss. 732. Dr. Cooper was a physician called in to see appellee when injured and therefore could not testify over his objection. *Railroad Company v. Messina*, 109 Miss. 143.

ETHRIDGE, J., delivered the opinion of the court.

Alonzo Spencer sued the Newton Oil Mill for personal injuries received by falling through a trapdoor in a platform of the plant of the Newton Oil Mill, alleging that the said trapdoor was attached to the floor of the platform by means of iron hinges which were old, rusty, rotten, defective, and unsafe, and that when the plaintiff walked over the said door the hinges broke, causing the door to fly up, striking the plaintiff in the stomach, and bruising and injuring him; that the plaintiff had no knowledge of the defect in the door; that it was dangerous and in a bad state of repair, and was known to the defendant, but unknown to the plaintiff, at the time of the accident; and, further, that it was negligence in having in a floor a trapdoor in a rotten, unsafe, and in a dangerous condition. The defendant pleaded the general issue, and gave notice that it would offer to prove under the general issue on the trial that the plaintiff had been warned that the door in question was not securely fastened and cautioned not to step upon it, and that he (plaintiff) deliberately did so and caused his own injury, if any he sustained.

The testimony for the plaintiff shows that the trapdoor was situated in the floor of the platform fastened by hinges and had become in a dangerous and unsafe condition, and that while engaged in the service of the defendant, and while carrying a scantling for the purpose of prying up a boiler on the sidetrack to be unloaded upon the platform, he stepped upon the trapdoor, fell, and was injured, and that he had not been told of the trapdoor or of its dangerous condition by any person. The testimony for the defendant defended upon



the theory that the plaintiff had been specially cautioned as to the unsafe condition of the trapdoor, and cautioned not to get upon it, the foreman of the defendant stating that he so told the plaintiff, and that he called to another employee just before the accident to bring a hammer and nails for the purpose of fixing the trapdoor; that he had stepped upon it, and had seen its dangerous condition, and was preparing to repair it; and that the defendant had just recently acquired the property, and was doing general repairs upon the property at the time. The plaintiff testified that he was confined to his home about four weeks, and that he was permanently injured, and was unable to do heavy work any more. He introduced Dr. Monroe, who had examined him some four weeks after the injury as to the bruise which he received. The defendant sought to introduce Dr. Cooper, who attended plaintiff after he was injured, but the plaintiff objected to Dr. Cooper's testifying, and his testimony was excluded.

The appellant assigns for error the exclusion of the evidence of Dr. Cooper, and the giving of instructions Nos. 1 and 2 for the plaintiff. Instruction No. 1 is as follows:

"You are instructed that the trapdoor in the floor of the platform, through which plaintiff fell, was inherently dangerous; and if you believe from the evidence that the plaintiff did not know of its being dangerous, then you must find for the plaintiff."

If there was a question as to whether or not the door was safe at the time of the injury, this instruction would be error; but the defendant admitted the dangerous condition of the door, and based its defense upon the theory that the plaintiff was cautioned not to get upon it. So, telling the jury that the door was inherently dangerous did not constitute error in this case.

The second instruction is as follows:

"You are instructed that it is the duty of the defendant to prove by a preponderance of the evidence that

the plaintiff had notice of the dangerous condition of the trapdoor through which he fell."

This instruction merely tells the jury that the burden is upon the defendant as to contributory negligence; the defense being specially pleaded that the injury was caused by plaintiff going upon the door with knowledge of its dangerous condition, after having been cautioned not to do so by the defendant. There is no dispute about the fact that the plaintiff fell and was injured, and this instruction was not prejudicial to the defendant's rights.

With reference to the testimony of Dr. Cooper, this question has been settled adversely to the contention of appellant in the case of *Yazoo, etc., R. Co. v. Messina*, 109 Miss. 143, 67 So. 963.

The judgment is therefore affirmed.

*Affirmed.*

STEVENS, J. (specially concurring). I concur in the result reached by the court in this case.

---

WILSON, STATE AUDITOR, v. NAYLOR.

[77 South. 606, In Banc.]

PUBLIC LANDS. *Refunds. Defective title. Limitation of actions. Accrual. Code 1906, section 2947.*

Under Code 1906, section 2947, providing for a refund of the purchase money where the state has no title to lands sold by it, the right of the patentee to such refund does not accrue, so that the statute of limitations begins to run against him, until the land commissioner cancels the patent and presents the original or a certified copy of the patent marked "canceled" to the auditor, the patentee having the right to depend on the patent until it is canceled. In such case it is not a question of warranty by the state upon which a right of action would accrue immediately to the vendee upon a breach to recover the purchase money. But simply a statutory right to a refund of the purchase money, and in pursuing his remedy the patentee must follow the methods laid down by the very statute which defines his rights.

APPEAL from the circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Mandamus by N. B. Naylor to require Robt. Wilson, State Auditor, to issue a warrant refunding the purchase money for certain land. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*Frank Robenson*, for appellant.

The patent was canceled under the provisions of section 2947 of the Code of 1906. In the case at bar the patent was issued in 1900 and the application was made to the Land Commissioner in May, 1917, seventeen years after the issuance of the patent. The state's contention is that appellee was charged with notice through all these years that the title was in the federal government as appeared from the public records in the land office of the federal government, and that on this state of facts the claim for a refund would be barred by the statute of limitations of six years, as provided by section 3097 of the Code.

Appellee's contention is that the statute of limitations does not begin to run in favor of the state until May 29, 1917, as this was the date on which demand could first be made upon the auditor for a warrant.

Section 3096, of the Code is as follows: "Statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof; but all such statutes shall run in favor of the state, the counties, and the municipal corporations therein; and the statute of limitation shall begin to run in favor of the state, the counties, and municipal corporations at the time when the plaintiff first had the right to demand payment of the officer or board authorized to allow or disallow the claim sued upon."

I am of the opinion that the appellee has failed to construe section 3096 in the light of section 2947. Appellee proceeds on the idea that he is the one to make

the demand upon the auditor, and that the cancellation of the patent is a condition precedent for making of this demand by the appellee. I call the court's attention to the pertinent fact that section 2947 of the Code does not provide that the patentee shall make any demand on the auditor at all, but this statute specifically, provides that when the patent shall have been marked canceled that the land commissioner and not the patentee shall take the canceled patent to the auditor, and that the auditor shall issue his warrants in favor of the patentee for the amount paid the state.

The court will understand that the point at issue then is, when the statute began to run, the appellee claiming that it began to run on May 29, 1917, and the state contending that the statute began to run immediately upon receipt of the purchase money by the state of Mississippi.

The only officer that the patentee has anything to do with under sections 3096, and 2947, of the Code is the land commissioner. Section 3096 says, "statutes of limitation shall begin to run in favor of the state, county and municipal corporation at the time when the plaintiff first had the right to demand payment of the officer or board authorized to allow or disallow the claim sued upon." It cannot be controverted that the appellee had seventeen years in which to make demand of the land commissioner to cancel his patent. To demand of the land commissioner is the only demand which the appellee may make under the statutes. The issuance of the warrant is a mere administrative formality as between the land commissioner and the state auditor after the cancellation of the patent, and section 2947 of the Code makes it the duty of the land commissioner to take the necessary steps to procure the issuance of the warrant. It seems clear to me that section 3096, as applicable to section 2947 of the Code, would make the statute of limitations begin to run at the time when the patentee had the right to first make demand of the land commis-

sioner, which is the only demand he can make under the statute.

Where one sells and conveys land owned by the United States and warrants the title, the covenant is broken when made, and a right of action therein accrues at once, which will be barred by the lapse of the statutory period after that time. *Pevey v. Jones*, 71 Miss. 647.

Counsel for appellee rely upon the case of *State ex rel. v. Chisago County*, Am. & Eng. Ann. Cases 1912D. 669, 115 Minn. 6, 131 N. W. 792. Counsel has misread this case and has quoted a statute of Minnesota as the opinion of the court. However, I have no fault to find with the decision in that case. In that case the court expressly said "within what time a person claiming such right must make his application is not here involved." In other words, the point at issue in the case at bar, as to when the statute begins to run, was not decided by the Minnesota court. It is clearly distinguishable from the case at bar.

I think that the statute begins to run when the defect in the title is discoverable and this of course, depends upon the facts in each particular case.

*J. R. McDowell*, for appellee.

I think a mere reading of section 3096 of the Code of 1906 will convince the court that the statute of limitations does not run in cases such as this. Section 3096 is as follows:

"Limitations of suits by and against the state, counties and municipal corporations.—Statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof; but all such statutes shall run in favor of the state, the counties, and the municipal corporations therein; and the statute of limitation shall begin to run in favor of the state, the counties, and the municipal corporations at the time when the plaintiff first had the right to demand payment

of the officer or board authorized to allow or disallow the claim sued upon."

It is clear that the appellee had no right to demand the refund of the purchase money until his patent had been canceled. His patent was not canceled until 1917, as will be seen by reference to the patent, which is brought up as an exhibit. His "right to demand payment of the officer or board authorized to allow or disallow the claim sued upon," therefore not having accrued until 1917, the statute of limitations did not begin to run until that right accrued, which was after the patent had been canceled. The attorney-general contended that the statute began to run against him as soon as the patent was issued because he could have investigated the records in the United States land office, and by so doing could have become acquainted with the facts that the state did not have title to the land which it had just conveyed to him by patent. I think this is clearly a misconception of the statute and of the law on this subject. It was never intended that the state should hold itself out to the public as the owner of lands, take their money and then plead the statute of limitations at some future date, when the patentee discovered that the state never had title to the land it had conveyed him.

The statute should be strictly construed, so that it should begin to run when the cause of action accrues. The cause of action does not accrue until the right to make demand accrues, and the right to make demand does not exist until the patent has been canceled, and the land commissioner did not cancel the patent until advised by the attorney-general that the state had no title. This was done in 1917. "Until a judgment turned a contingency into a certainty the statute did not begin to run." *Swing v. Brister* 87 Miss. 516.

I find the following case which seems to cover the case at bar like a blanket. *State ex rel. v. Chisago Co.*, Am.

& Eng. Ann. Cases 1912D, 669; 115 Minn. 6; 131 N. W. 792.

"The statute of limitations upon an implied warranty of title to chattels held by one in possession does not commence to run until the vendee is disturbed in his possession by the owner." *Goss v. Kierski*, 41 Cal. 111. See, also *Ripley v. Withell*, 27 Tex. 14 *Anding v. Perkins*, 29 Tex. 348; *Coplinger v. Vaden*, 5 Hump. (Tenn.) 629.

The appellant seemed to rely upon the case of *Pevey v. Jones*, 71 Miss. 648, but the court will see that that case is between two individuals, and under the law there is a different provision about the running of statutes of limitation in favor of the "state, the counties and the municipal corporation therein," which is provided for exclusively by section 3096, and, therefore, the case relied on by appellant has no bearing on the instant case. Section 3096 controls the instant case, and no other statute of limitations of three years, six years, or any other statute of limitation controls here.

The learned court below correctly decided the case, and the judgment should, therefore, be affirmed.

*Baskin & Wilbourn*, for appellee.

The assistant attorney-general thinks the statute of limitations began to run when the defect in the title was discoverable. This cannot be, for a number of reasons. In the first place, the whole contemplation of the statute negatives such an idea; in the second place, there was no right to sue for the refund of the money when the defect in the title was actually discovered. If the actual discovery of the defect in the title could not set in motion the statute of limitations, because it did not give any right to sue for the refund of the money, then we cannot conceive how it can be said the statute began to run when it might have been discovered that the title was defective.

Section 2947 of the Code of 1906, clearly indicates the will of the legislature that a patent should be canceled by and in the manner set forth in section 2947, whenever at any time the land commissioner discovered that the state did not have title to the land when it sold it.

The opinion rendered to the auditor by the attorney-general, Hudson, referred to in the brief of the assistant attorney-general, for the state in the present case, is, we respectfully submit, not well founded. The right to demand payment of the officer authorized to allow or disallow a claim sued upon did not arise in this case immediately upon the purchase of the property. There was never any right to demand payment until the cancellation of the patent had been accomplished by the act of the land commissioner and the land commissioner had presented the canceled patent to the state auditor. Then and then only did the right to demand payment arise. All prior to that time the purchaser from the state and his assignees had a *prima-facie* title from the state upon which they had a right to rely and had been in possession of the property with an unchallenged title until shortly before May 29, 1917, and could not have demanded payment of any officer whatsoever of any amount of money whatsoever, and had no right to maintain any suit for the recovery of any money whatsoever, prior to May 29, 1917.

We think that the assistant attorney-general, and any other attorney-general who may have ruled that the statute of limitations barred such a claim as this, under the facts of this particular claim, has misconceived the purpose and intent of the legislature.

We, therefore, respectfully submit that this case ought to be affirmed.

STEVENS, J., delivered the opinion of the court.

Appellee filed a mandamus suit against the state auditor to require the issuance of a warrant refunding the



purchase money for certain land purchased from the state. It appears that one W. T. Keeton purchased eighty acres of land from the state in March 1900, and received a patent therefor. In 1905 appellee purchased the land from Keeton and in May, 1917, appellee requested the land commissioner to investigate and cancel the state's title to said land because it appeared that the title was in the United States government. The land commissioner investigated the title, referred the matter to the attorney-general in accordance with the method provided by statute, and the attorney-general rendered an opinion to the land commissioner to the effect that the state had no title. Appellee then demanded from the auditor the issuance of a warrant in accordance with the provisions of section 2947, Code 1906. This statute reads:

“Patents Canceled Where State has no Title.— . . . If the state of Mississippi, through the auditor or land commissioner's office, has heretofore issued, or shall hereafter issue, a patent or patents for any lands to which the state holds no title, or which did not belong to it at the time of the issuance of such patent or patents, or any part of which land may have caved into the river before the issuance of such patent or patents, or by oversight or otherwise two patents may have been, or may hereafter be, issued therefor, the land commissioner shall investigate the case and report to the attorney-general, who, if he shall find the lands so patented did not belong to the state, shall so report to the land commissioner, and if the land commissioner shall find that such lands or any part thereof had caved into the river before the issuance of such patent, or that the patentee did not acquire any land or title under such patent he shall mark such patent or patents, or in case of loss of the original, the certified copy of such patents, ‘canceled,’ and take them, or a duly certified copy, to the auditor of public accounts, who shall file the same as a voucher in his office, and shall issue his warrant

in favor of the patentee or his or her assignees, heirs, or representatives, for the amount paid the state for such canceled patent or patents, and the land commissioner shall certify all such cancellations to the clerk of the chancery court of the county in which said patents have been recorded, who shall thereupon cancel the record of it. When only a part of the purchase money is refunded it shall be first noted by the land commissioner in ink across the face of such patent and noted by the chancery clerk upon the record of patent canceling it in such proportion only."

The auditor, acting under legal advice, declined to issue a warrant, contending that under section 3096, Code 1906 (section 2460 Hemingway's Code), the statute of limitations operated in favor of the state and barred appellee's right to a refund. Then it was that appellee filed his petition for a mandamus to compel the issuance of the warrant. The circuit court rendered a judgment in favor of appellee, and from this judgment the state prosecutes an appeal.

It is conceded that statutes of limitation in civil cases run in favor of the state, and that they begin to run "when the plaintiff first had the right to demand of the officer or board authorized to allow or disallow the claim sued upon." But the statute (section 3096, Code 1906) has not barred appellee's right in the present case because the land commissioner, under the advice of the attorney-general, did not cancel the patent until May, 1917, and the right of Mr. Naylor to a refund of the purchase money did not accrue until the land commissioner canceled the patent and presented the original or a certified copy of the patent marked "Canceled" to the auditor. Under the statute the auditor is powerless to act until he is presented with the canceled patent, and then for the first time he has the right to issue a warrant in favor of the patentee or his assignee, heirs, or representatives, for the amount of the purchase money. There can be no cancellation under this statute until the

attorney-general and the land commissioner find "that the patentee did not acquire any land or title under such patent," and no warrant can issue until the canceled patent or a certified copy thereof is presented to the auditor of public accounts. This is the method plainly outlined by the statute itself. Without this statute appellee would not be entitled to a warrant in the present case. There is a method outlined by section 2927, Code 1906, providing that the state shall refund the purchase money to its vendee or his heirs or assigns where the title to land sold by the state has failed, "but the question of failure of title can only be determined, except as hereinafter provided, in a suit filed in the county in which the land is situated, and the land commissioner shall be made a party to every such suit." The rights of appellee are not based upon section 2927, and are not attempted to be based upon that statute. The sole reliance here is upon section 2947, which may be termed a refunding statute, a summary proceeding for the cancellation of patents where the state's title is obviously bad, and the state in this summary proceeding relies upon the good judgment of the land commissioner and the legal advice of the attorney-general. There is no dispute about the facts of the present case. It is manifest that appellee's "right to demand payment of the officer," in this case the state auditor, did not accrue until May, 1917, and that the statute of limitations could not begin to run until that right had accrued. Of course, the cause of action here was not available until the right to demand the warrant accrued, and this right was first brought into existence by the cancellation of the patent. It was said in *Swing v. Brister*, 87 Miss. 516, 40 So. 146, 6 Ann. Cas. 740, that until a judgment turned a contingency into a certainty the statute did not begin to run. So here, until the cancellation of the patent turned a contingency into a certainty the statute did not begin to run.

But it is contended that under the holding of *Pevey v. Jones*, 71 Miss. 647, 16 So. 252, 42 Am. St. Rep. 486, where one conveys land owned by the United States and warrants the title, the covenants are broken immediately upon the execution and delivery of the deed, and that the right of action at once accrues to the vendee to recover the purchase money. *Pevey v. Jones* has no application to the question here under consideration. This is not an action upon the covenants contained in the deed. The state has not warranted the title, and is not here sued upon its warranty. Appellee is only claiming a statutory right to a refund of the purchase money, and in pursuing his remedy follows the method laid down by the very statute which defines his rights. The right and the remedy are both provided by the statute under review. The case of *Pevey v. Jones* was an action between two individuals. Here the sovereign state is dealing with one of its own citizens.

The case of *State ex rel. v. Chisago County*, 115 Minn. 6, 131 N. W. 792, Ann. Cas. 1912D, 669, supports appellee's contentions. That was a proceeding by mandamus to compel the refund of taxes paid by a holder of a void tax title. It is there held that:

"The holder of a tax certificate is not bound to assume or determine that his title is invalid. It carries the inference of validity. . . . If the rule were as claimed, the holder of a tax certificate, instead of resting on its presumed validity, would be bound to examine each step in the tax proceeding in the light of each decision of the supreme court, and determine at his peril, if within the principles of any decision his tax title is void. . . . The state holds out an inducement to purchasers at such tax sales and payment of subsequent taxes that there shall be acquired a title to such land, and the right to receive back the money paid and interest, should the tax title be declared void."

And cannot it be said here that the holder of a title conveyed by the state might well be ignorant of any

infirmity in the title and indeed might be ignorant of the fact that the paramount title was outstanding in the United States? The state assumes to convey a good title to its citizens—perhaps in many instances not conversant with land titles or the law in reference thereto; and should not the patentees rest in confidence upon the state's patent until that patent has been declared void or canceled? Any other view would put the state in the attitude of holding itself out as the owner of lands, of taking the purchase money from the state's vendees, and then at some remote period of denying the patentee's right to recover back the purchase money solely because the latter has not sooner attacked his own title. The holder of the state's patent might be in possession, using and enjoying the premises. Surely he is not expected to trade for the land one minute and sue the state the next.

The case of *Brown, Land Commissioner, v. Ford*, 112 Miss. 678, 73 So. 722, foreshadows the views now announced. In speaking of the right to sue for recovery of the purchase money, we then said:

"If the auditor should refuse to issue a warrant in payment of the claim thus presented (a decree of the court canceling the state's title), then, and not until then, could appellees, under section 4800 of the Code, institute a suit against the state."

*Affirmed.*

Cook, J., dissents.

ETHRIDGE, J. (dissenting). In my opinion, under section 2947, Code 1906 (Hemingway's Code, section 5282), the applicant could have filed his claim for a cancellation and refund immediately upon the passage of this statute in the year 1904. The patent had been outstanding since March, 1900, and certainly that was sufficient time for the applicant to have determined the *status* of his title acquired from the state. The claim as now presented was filed by the applicant, and did not accrue

by the land commissioner on his own initiative striking the land from the roll and canceling the patent. All rights under the law may be enforced in the manner pointed out by the law by the person in whom the right exists. It has never been the practice, and certainly it could not be construed to be the law, that the applicant had no right to make the demand for the cancellation. If that be the law, then the applicant has no right here because this proceeding was set in motion on his petition. Section 3096, Code 1906 (section 2460 of Hemingway's Code), reads as follows:

"Limitations of Suits by and against the State, Counties and Municipal Corporations.—Statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof; but all such statutes shall run in favor of the state, the counties, and the municipal corporations therein; and the statutes of limitations shall begin to run in favor of the state, the counties, and municipal corporations at the time when the plaintiff first had the right to demand payment of the officer or board authorized to allow or disallow the claim sued upon."

Under the very terms of this statute the statute of limitations shall begin to run in favor of the state when the party first had the right to demand payment. The question then arises as to when in the present case could the applicant or appellee have first demanded payment. In *Pevey v. Jones*, 71 Miss. 647, 16 So. 252, 42 Am. St. Rep. 486, Judge CAMPBELL, speaking for the court, used the following language:

"As to the land belonging to the United States, the covenant of warranty was broken the instant it was made, and a right of action on it then accrued, and was barred when this action was commenced. The true doctrine is that the United States are always seised of their lands, and cannot be disseised as private owners may be; that land belonging to the United States cannot lawfully be the subject of sale and conveyance by individuals,

so as to confer any right; that a grantee of such land by another than the United States cannot take possession without becoming a wrongdoer, and liable to summary ejection; and, therefore, that a covenant of warranty, in a conveyance of land belonging to the United States, must be viewed differently from one where the ownership is by a private person; that the grantee is not required to take possession, or attempt to get it, and that a right of action immediately accrues to recover for a breach of warranty, not dependent on any future event, but fixed by the fact of ownership of the land by the government. In this case, the grantee acquired nothing whatever as to the land owned by the United States; and, by virtue of the transaction, his vendor, on receipt of the purchase money, thereby at once became liable to him for money received to his use. We are not aware of any direct authority for this view, but it seems to result necessarily from what is well settled, and we do not hesitate to make a precedent so fully supported by reason."

It will be seen from the reasoning of this case that the rule is that where title to land is in the United States government there can be no rightful occupancy by any one else without the consent of the United States, and that for that reason the grantee is disseised of possession and his rights accrue at once. It is difficult for me to comprehend any difference between the right when the state is a party and when the individual is a party. The state had no more right to make a conveyance than an individual did where the title of land is in the United States government and when the party paid a consideration for this deed which the state had no right to make he had a right at least in a reasonable time to make demand for repayment. It was his duty to investigate his title as speedily as a reasonably prudent man would be required to do in the case of individuals. While the state's deed is not in terms a warranty, yet by reason of the statute involved here it is in effect a warranty to

the extent of repaying the purchase money. In legal effect the state does warrant its title to this extent. It seems that there is a disposition or tendency to try to class the state differently from individuals, and a belief that the state is a proper subject for spoliation at the hands of any private person. The state is the people in a collective sense, and its right should be no less respected than the rights of an individual. Indeed, there is reason for believing that the state's right should be more tenderly regarded because of its incapacity to exercise the same vigilance that an individual would exercise. I see no reason why the rule here would apply to claims against a county because under the statute no suit can be brought until a claim is first presented for allowance to the board of supervisors, and it can as readily be said that no right of action accrued until the board declined to pay the claim. Section 3096 Code 1906 (section 2460 of Hemingway's Code) was enacted for the very purpose of preventing a party having a claim against the state, county, or municipality from keeping it until the facts might become doubtful or incapable of proof, and was designed to make parties having claims diligent in presenting them for payment so that the state, county, or municipality would know how to conduct its business. The case of *State v. Chisago County*, 115 Minn. 6, 131 N. W. 792, Ann. Cas. 1912D, 669, cited by the majority as a precedent, recognizes the duty of the holder of a claim to present his application for a refund within a reasonable time. The court uses this language:

"If he does determine that it is invalid, and claims a refundment under a particular decision, he is bound to make a timely assertion of his right. Within what time a person claiming such right must make his application is not here involved."

The decision of *Pevey v. Jones*, 71 Miss. 647, 16 So. 252, 42 Am. St. Rep. 486, was decided at the October term, 1893, long before the purchaser from the state



made his purchase, and under this case at the time he made the purchase he was bound to know that if the lands were in the United States he must make application speedily. The attorney-general's department has for many years, and certainly from 1908 to date, applied the statute of limitation to these claims, and as the attorney-general is the advisor of the administrative departments under the law, this construction should not be departed from unless manifestly wrong, and I do not believe it is manifestly wrong, but, on the contrary, that it is manifestly right.

### LAMAR COUNTY v. TALLY & MAYSON.

[77 South. 299, In Banc.]

1. ATTORNEY AND CLIENT. *Compensation. Compromise.*

Where the board of supervisors of a county contracted to pay attorney's compensation only in the event that they successfully resisted the payment of certain county warrants and the circuit court in which the suit was brought to collect such warrants decided adversely to the county, and the board of supervisors of the county, over the objections of the attorneys who had taken an appeal, compromised the case. In such case the attorneys were not entitled to compensation, since the litigation did not terminate successfully for the county according to the terms of the contract with the attorneys.

2. SAME.

In such case the board of supervisors had the right to control the litigation and dismiss the appeal and compromise the suit, if it deemed it advisable, and it must be assumed where the record is silent as to the matter, that the determination by the circuit court adverse to the county's interest was correct.

3. COUNTIES. *Contracts. Validity.*

A county must act by order entered upon the minutes of its board of supervisors, in reference to its contracts, and where a contract is made it can only be varied by an order entered upon the minutes of the board.

116 Miss.]

Brief for appellants.

4. COUNTIES. *Contracts. Board of supervisors.*

The board of supervisors being trustees of the public cannot divest itself of the right to control litigation against the county.

APPEAL from the circuit court of Lamar county.

HON. A. E. WEATHERSBY, Judge.

Claim by Tally & Mayson, attorney, against Lamar County. The claim being denied by the board of supervisors, claimants appeal to the circuit court, where judgment was rendered for claimants and the county appeals.

The facts are fully stated in the opinion of the court.

*Hathorn & Hathorn*, for appellants.

Our first contention is that under the contract or order of the board exhibited by appellees, if their claim is being asserted under it, they are not entitled to attorneys' fees, for the reason that the suit of the *White Company v. John I. Cook, Treasurer*, was not "successfully terminated in favor of said treasurer." The fact is the suit was lost and under appellee's contract they were entitled to no compensation at all.

The burden is of course on appellees show by a preponderance of the evidence, everything necessary to establish their claim and the same rule applies in presenting to the board of supervisors as would in a court of law. Have they met the burden?

The contract says: "It is hereby ordered that Tally and Mayson be employed to represent and defend the said treasurer against any action filed against him to compel the payment of said warrant."

There is nothing in the contract to indicate that the case was to be carried to the supreme court, and we are sure that if the case had successfully terminated in favor of the treasurer in the circuit court, that under this contract appellees would have been entitled to the five hundred dollars appropriated and certainly

so unless it had been clearly shown that the intention of the parties in contracting was that the case must be defended on through all the higher courts.

We insist however that instead of appellees showing that they were entitled to have the court of last resort pass upon the case before they would be barred from recovery under their contract, they have shown conclusively that it was never intended either by themselves or by appellants that they should prosecute the appeal to the supreme court. The record shows that the district attorney, whose official duty it was to represent appellants, prosecuted the appeal, the only thing being done by him being the filing of a petition for appeal, and notice to the stenographer, and that the board abandoned the appeal before anything was done further.

Certainly defendants had a right not to appeal the cases if they wished, and they were under no obligation, either moral, legal, or contractual, to appeal the cases in order that it might be determined whether or not appellees had earned their fee under their contract; especially since the contract does not specifically provide for the appeal. Who has the right to say where the cases shall be stopped, the defendants, or appellees? Appellants and the defendants to the suits had the exclusive right to abandon the appeals, and appellees, under the facts as shown by this record, have no just cause of complaint.

If they can recover at all, they must recover on the contract, and this they cannot do, and, as we understand from Mr. Mayson's testimony, they are not even attempting to do. They cannot recover in the case as disclosed by this record on *quantum meruit*.

"The board of supervisors can only bind the county by an affirmative act within the scope of its authority. Its contracts must be evidence by an entry on its minutes, and the same cannot be varied by proof that the party dealing with the board was led into a misunder-

standing of the contract by some members of the board, who in open session, when the contract was entered into made incorrect statements to him as to its terms. *Bridges v. Clay County*, 58 Miss. 817.

The case of *Groton Bridge & Manufacturing Co. v. Warren County*, 80 Miss. 214, 31 So. 711, covers the foregoing question very fully, and goes at length to expound the law, and a reading of it must convince the court that appellees cannot recover in this case on *quantum meruit*.

The court in that case, quoting from *Delafield v. Illinois*, 2 Hill. 175 and *Wolcott v. Lawrence County*, 26 Mo. 272, with approval says: "The petition in this case does not aver a contract of any kind with the county court, but plaintiff seeks to recover upon a *quantum meruit*. In our opinion the county is not liable upon an implied promise. The acceptance of the building by the county court did not help the plaintiff, for the ratification must come from the principal."

In *Marion County v. Woulard*. 27 So. 619, where Woulard was suing to recover for services as a quarantine guard, the court said, in reversing the judgment of the circuit court: "Nor was there any contract made on the minutes of the board, nor was there on said minutes an order, establishing local quarantine, etc.," and citing thereunder with approval *Bridges v. Clay County*, *supra*.

11 Cyc. page 397, says: "County boards are unusually required to keep a regular record of their proceedings at each session, and when they are required to keep a regular record of their proceedings they can speak only by such record." Also on page 398: "It is the usual rule that the action of county boards, in order to be binding upon the county, must be shown by the record of their proceedings. It has been so held in respect to contracts made by them.

- Certainly appellees would have to show, by a preponderance of the evidence that appellants have not lived up to the contract before it could be laid aside and a recovery had on *quantum meruit*, if such recovery could be had against the county in this case at all, and this they have wholly failed to do. The court will
- bear in mind that this recovery is not based on a verbal contract of the board or a verbal understanding which was not placed on the minutes, but on *quantum meruit* for services which the board did not consent to at all, except it be the contract which appellees say they were prevented from carrying out, hence the case is clearly distinguished from *Crump v. Colfax County*, 52 Miss. 107.

We earnestly insist that, viewing this case from its every angle and taking the entire record, this court will reverse the judgment of the circuit court and enter an order here affirming the judgment of the board of supervisors.

*J. W. Flowers*, for appellee.

Under section 309, a county may sue and be sued. When it is sued or when there is a suit which involves the county's interests and the county is in court directly or indirectly, it is subject to the same general rules that control litigants of other kinds. A county should not be embarrassed in making compromises. It should be able to settle cases just as other litigants settle them when they think best. *State v. Fragaicomo*, 71 Miss. 425, 15 So. 798; *Eastman-Gardner Company v. Adams*, 58 So. 221.

When a county makes a contract like this that was made with these appellees, that is, to pay a fee provided certain litigation shall be carried to a successful conclusion the county does not relinquish to the attorneys its right to compromise the litigation. It would not

be just, however, to allow to a county the right to undermine its contract by the exercise of this inherent right to compromise. The county should not be permitted to exercise this undoubted right at the expense of the attorneys already engaged to prosecute the litigation to the end. To engage attorneys and permit them to go part of the way and perform part of the services under an agreement that they shall prosecute to the end and be paid only in the event their services are successful and then to settle the case over their protest would be unfairness and injustice approaching fraud if the attorneys are left without remedy. Compromises are usually brought about by services of the attorneys. In most instances of this nature the court would get the benefit of the services in the compromise. The county gets the benefit of the services before the point is reached at which the attorneys might under their conditional contract demand their compensation.

It is argued by counsel for appellant that since there was a contract with these attorneys which was not carried out then they have no contract upon which to stand, and that since they have no contract under the terms of which they can recover, they cannot recover the value of their services. Three or four authorities are cited which we will mention later. However, the general rule is that where a county board has authority to make a contract and one is undertaken to be made, though irregularly made, and the work is done by the person with whom the board is dealing, the county will have to pay the reasonable value of the services rendered. See *State of Minnesota, ex rel. v. Clarke*, 116 Minn. 500, 134 N. W. 129; 39 L. R. A. (N. S.) 43, and note; also note to *Perry Ice Company v. Perry*, 29 Okla. 593, 39 L. R. A. (N. S.) 72. These notes refer to a more extensive one beginning on page 1117 of 27 L. R. A. (N. S.).

In support of the said general rule there are cited two Mississippi cases. One of these is *Methodist Church v. Vicksburg*, 50 Miss. 601. The other case cited in the said note in 27 L. R. A. (N. S.) is *Crump v. Colfax County*, 52 Miss. 107.

This holding of the court is distinguishable from that in *Board of Supervisors v. Patrick*, 54 Miss. 240, in which case a contract to build a courthouse was publicly let after notice and the contract was made based upon the specifications on file at the time. The contractors after the building was completed presented a claim for two thousand dollars worth of extra work and material; of course if the board had to let the contract publicly in the first instance and according to specifications on file and the contract was made on the basis of these specifications neither the individual members of the board nor the commissioner in charge of the work could authorize any variations from the contract in such manner as to bind the county. The same thing may be said of the decision in *Bridges v. Clay County*, 58 Miss. 817, wherein it appeared that public bridges had been let according to plans and specifications and the contractors claimed that they misunderstood the specifications and undertook the contract at a less sum than they otherwise would.

The case of *Groton Bridge Company v. Warren County*, 31 So. 711, 80 Miss. 214, cited by counsel for appellant deals with the same situation. There was a contract which had been made in the manner provided by law and the law required that there be a public letting. The contract was to build a bridge over Big Black River. It was found by the builder that one of the piers had to be built higher than the specifications called for. With the consent of the engineer and the president of the board the extra work was done. And the court said the board had no authority to pay for the extra work.

The case of *Marion County v. Woulard*, 27 So. 619, throws no light on the question. It does not appear that the quarantine guard had been provided for by any order of the board. In fact there had been no local quarantine established. The authority of the board to arrange for guards had not been created by the necessary preliminary local legislation.

The courthouse and bridge cases above mentioned had to construe what is now section 361, of the Code. This was section 340 of the Code of 1892 and section 2179 of the Code of 1880. The form of it is section 1388 of the Code of 1871 is in a general way the same. Such contracts have to be let, after due notice to the public to the highest bidder. It will not be contended that the work which it is desired to employ an attorney to do should be shown by specifications and notice of the purpose to let the contract published and the contract to do the work let by public outcry.

In *Land v. Allen*, 40 So. 117, the facts shown differ from these in the case at bar only in that there was an order on the minutes approving the action of the county attorneys in bringing the suit and fixing the amount of the fee to be paid. In the instant case the difference is very slight.

The case of *Hall, et al. v. Gunter & Gunter* (Ala.), 57 So. 155, presents a state of facts very similar to these now before this court. See note on page 92, 6 L. R. A. (N. S.).

Of course we are assuming here that when a municipal corporation makes a valid contract and then itself renders performance on the part of the other contracting party impossible, it must respond just as any other litigant would have responded.

It will be noted too that the statute authorizing boards of supervisors to employ attorneys does not require even that the compensation be fixed in advance. The



attorneys engaged shall be paid reasonable compensation for their services.

A county has to do right like any body else. It has to pay for what it gets. It got the benefit of the services of these lawyers and coined this benefit into what they considered an advantage to their liking. It certainly cannot be said that the county may thus get their services, use the benefit of them, prevent the further and full performance of the contract and then successfully refuse to pay anything.

A distinction appears to be recognized by our court between contracts which have to be publicly let to the best bidder and contracts which do not have to be so let. At least it is true that this court has not so rigidly enforced the technical rules when dealing with transactions of the county pertaining to these smaller matters.

Whether the doctrine of estoppel is invoked or of ratification, or of implied contracts, the result is worked out so as to do justice where the other party has given the county in good faith, labor, material or services. As illustrated by the *Crump case*, *supra*, and by *Land v. Allen*, *supra*. See also 7 Ruling Case Law, pp. 946-947.

What these appellees did was expressly authorized and was expressly ratified. There was an order put on the minutes before and after. There was nothing left unsettled except the amount of the compensation. And this was rendered uncertain by the act of the board. The statute says the board may employ counsel and pay reasonable compensation. It is undisputed that the fee charged here is reasonable. The circuit judge so held.

It is clear that the judgment of the lower court should be affirmed.

ETHRIDGE, J., delivered the opinion of the court.

Tally & Mayson, attorneys, filed a claim with Lamar county for five hundred dollars, claim being in the following words:

“Lamar County, Debtor, to

Tally & Mayson, ..... \$500. 00

“For the value of services rendered Lamar county in the suits lately pending in the circuit court of Lamar county, wherein the White Company was plaintiff, and John I. Cook, treasurer of Lamar county, defendant in one suit, and R. L. McNair, clerk of the board, defendant in the other suit.”

This claim was filed under contract made by the board of supervisors at its January, 1916, meeting, which contract is in the following words, as evidenced by the minutes of the board:

“Whereas, at the December, 1915, meeting of the board of supervisors of Lamar county, the board authorized the clerk to issue three warrants in the sum of six thousand one hundred ninety-one dollars, and fifteen cents in payment of one White tractor engine and freight; and whereas, this board passed an order at this meeting, which order is of record in Minute Book 3 at page 182, directing the treasurer of said county to refuse to pay the said warrants, for reasons as set out therein; and whereas, the said White Company, through its salesman, M. C. Munson, has made known to this board by verbal statement that the said White Company expected to make formal demand on said treasurer for payment of said warrants, and that on refusal to do so that the said White Company would institute proceedings in law to force and compel the payment of said warrant, and it being the intention of this board, for and in behalf of said county of Lamar, to defend any action in court that may or might be instituted against said treasurer: It is hereby ordered

that Tally & Mayson be employed to represent and defend the said treasurer against any action filed against him to compel the payment of said warrant, and it is further ordered that the sum of five hundred dollars be appropriated out of the general county funds of said county for the purpose of paying said Tally & Mayson as a fee for services to be rendered, provided, however, that if any such action or suit is successfully terminated in favor of said treasurer, then the payment to be made; otherwise the county only agrees to pay accrued costs, etc.; and the board further agrees for and in behalf of the county to fully and completely protect the said treasurer against any costs or damages that might accrue against him for refusal to pay said warrant.

“Ordered this the 9th day of February, 1916, in open session.

“Voting aye: Carter, Weems, Stanford. Voting nay: J. D. Hatten, Geo. W. Byrd.”

It appears that under this contract the cause referred to came on for hearing in the circuit court, and a judgment was rendered adverse to the treasurer of the county. From the judgment of the circuit court the district attorney and Tally & Mayson took an appeal to the supreme court. At the August meeting, 1916, the board entered an order on its minutes ratifying the action of the district attorney and his associates in appealing this case, and in this order ratifying it is recited that the board will pay the costs if the case is affirmed by the supreme court. An order was entered at the September, 1916, meeting of the board compromising this suit in which it is recited that the suit in the circuit court terminated adversely to the defendants Cook, treasurer, and McNair, clerk. The order recites the agreement of compromise, and it recites that Tally & Mayson appeared and objected to the dismissal of the appeal. The board of supervisors disallowed the claim of Tally & Mayson for services under the above con-

tract, and the case was appealed to the circuit court, and judgment was rendered in the circuit court against the county and in favor of Tally & Mayson for the sum of five hundred dollars. We are of the opinion that Tally & Mayson cannot recover from the county upon the contract sued upon because it was expressly stipulated in the contract that the payment was only to be made in case the suit against the treasurer terminated favorably to the treasurer. The county must act by order entered on its minutes in reference to its contract, and where a contract is made, it can only be varied by an order entered upon the minutes of the board. See *Bridges v. Clay County*, 58 Miss. 817; *Groton Bridge & Mfg. Co. v. Warren County*, 80 Miss. 214, 31 So. 711; *Leflore County v. Cannon*, 81 Miss. 334, 33 So. 81; 7 R. C. L. 950, section 26; 11 Cyc. 468, par. 2; *Marion County v. Woulard*, 77 Miss. 343, 27 So. 619; *Dismukes v. Noxubee County*, 58 Miss. 612, 38 Am. Rep. 339. In *Groton Bridge & Mfg. Co. v. Warren County*, 80 Miss. 214, at page 218, 31 So. 711, at page 712, the court said:

"The petition in this case does not aver a contract of any kind with the county court, but the plaintiff seeks to recover upon a *quantum meruit*. In our opinion the county is not liable upon an implied promise."

Again on the same page it is said:

"It is plain from this that a county cannot, as to the subject-matter covered by section 344, be bound by an implied contract. The very purpose of this statute was to cut off entirely any possibility of fraudulent claims for extra work done," etc.

The record in this case does not contain the pleadings, evidence, etc., involved in the suit in which it is alleged that Tally & Mayson rendered services of the value of five hundred dollars. We are unable to tell from this record as to whether there was any merit in the appeal or not. The substance of the issues in that suit is not set forth in the bill of exceptions, and we

are bound to presume that the judgment of the circuit court was correct. The parties made a contract, the terms of which provided that the board would not be liable for the attorneys' fee unless the judgment was favorable to the treasurer. The judgment was adverse to the treasurer, and the county was under no obligation to appeal. The county complied with its contract. The plaintiff failed to impress or establish liability on the county because they failed to comply with a condition precedent imposed by the contract, and they cannot, therefore, recover on the contract. It is clear that they cannot recover on the *quantum meruit* theory against the county, because the county can only be bound by contracts made in the manner required by statute.

The board of supervisors had the right to control the litigation and dismiss the appeal, and it was its duty to do so, if it was convinced such appeal would result adversely to the county. The board, being trustees of the public, cannot divest itself of this power and duty by contract.

Judgment of the court below is reversed, and judgment entered here for the county.

*Reversed, and judgment here.*

STEVENS and HOLDEN, JJ., dissenting.

---

### BARNER v. RULE.

[77 South. 521, Division B.]

1. EXECUTORS AND ADMINISTRATORS. *Disputed claims. Review. Questions of fact.*

Where on the trial of a contest by the administrator of a claim against the estate of his decedent, the books of the claimant were introduced and their correctness duly attested by the book-

keeper, who in addition testified positively as to paying out all the items of cash charged on the account against the decedent either to the decedent himself or at his request, to his employees, in such case the credibility and weight of this testimony was a matter for the determination of the auditor and the chancellor, who gave full hearing to the auditor's report.

2. EVIDENCE. *Book of account. Cash items.*

Where there was a custom between a merchant doing a large business and employing clerks and a bookkeeper and keeping the usual elaborate set of books and B. who had a number of hands or employees working for him, whereby the merchant advanced supplies and items of cash from time to time to B and his employees and charged the cash items to B's account in the same way that the goods were charged, and his bookkeeper would make out a statement of the account monthly and submit it to B. for his information and approval, and the integrity of the books and correctness of the itemized account was vouched for by the bookkeeper and his assistant, and there was nothing to indicate any irregularity in the method of keeping the books or any suspicion of improper dealing appearing on their face. In such case the books were admissible on the trial of a claim against the estate of B. to prove the items of cash charged on the account as well as the items of goods, especially where the bookkeeper had personal knowledge of many of the items and was quite positive about the correctness of all the cash items.

APPEAL from the chancery court of Sunflower county.

HON. E. N. THOMAS, Chancellor.

Proceeding by J. W. Rule against W. G. Barner, Administrator. From a decree allowing the claim, the administrator appeals.

The facts are fully stated in the opinion of the court.

*Whitfield & Whitfield* and *Franklin & Burrow*, for appellant.

*J. H. Price*, for appellee.

STEVENS, J., delivered the opinion of the court.

In the course of the administration of the estate of J. D. Bartlett, deceased, appellee, J. W. Rule, presented

an itemized account against the estate which was by the clerk probated, allowed for the sum of one thousand, four hundred thirteen dollars, and three cents and duly registered. The administrator contested the probated claim of Mr. Rule and upon the application of the administrator the account and the issue presented on the several objections of the administrator against the allowance of the account was referred to an auditor. The claim as probated consisted of a promissory note for one hundred eighty-eight dollars and nine cents and items for goods, wares, and merchandise sold and delivered and cash advanced to and for the account of the deceased. The auditor made report disallowing the note which was barred by the statute of limitations, but allowed the itemized account. The administrator filed elaborate objections to the report of the auditor, and the report together with the testimony taken down by the auditor and all objections to the report were submitted to the chancellor, who confirmed the auditor's report and allowed the claim of appellee. From the decree of the chancellor allowing the claim the administrator prosecutes this appeal, and renews or presents afresh to this court the objections urged before the auditor and before the chancellor.

Liability for any portion of the account was denied, and appellee put to the proof. Many objections to the account are urged. At to most of these objections it is sufficient to state that in our judgment, they are without merit. The account was substantially itemized, and the objection on that ground may be disposed of under the ruling of the recent case of *Duffy & Kilroe*, 76 So. 681. The only point which we think it worth while to discuss is the contention that the book accounts of Mr. Rule were not competent evidence to prove the various items of cash charged on the account against the deceased. The determination of this question depends to some extent upon the relationship of the par-

ties and their course of dealing, one with the other. Mr. Rule was a merchant doing a large business, employing clerks and a bookkeeper, and keeping the usual elaborate set of books. The record shows that Mr. Bartlett had employees or "hands working for him," and that appellee regularly advanced to Bartlett and his employees supplies and money. In proving the items of the account the books were introduced. The correctness of the books was duly attested by Mr. Burke, the bookkeeper. More than this, this witness gave positive testimony that he himself paid out all items of cash charged on the account and either himself made the entries of all cash charged or had these entries made under his direction. He was asked, "Who gave Mr. Bartlett the money?" and in response stated:

"I gave it to him myself. I gave Mr. Bartlett the cash, and then would turn to his account and charge him with the cash on Mr. Rule's ledger, and charge him with the cash, and at the same time put it on the cash-book. . . . Every night I would foot up the debits and credits of my cashbook to see how much cash I had on hand."

The account also has charges of cash paid to third parties for Bartlett. On this point witness stated that Mr. Bartlett "would come into the office and say give me so much cash and charge it to me by A. or for C.," Bartlett's employees. The credibility of this testimony and the weight of the evidence was a matter for the determination of the auditor and the chancellor, who gave full hearing to the auditor's report. We cannot say that the findings of fact by the auditor and by the chancellor are manifestly wrong.

There was no error in allowing Mr. Rule to introduce his books of account to prove the items of cash advanced as well as items for goods sold and delivered. On this question it must be conceded the authorities are in conflict. The cases *pro* and *con* are indicated by Mr. Wig-



more, pars. 1539 and 1549; Elliott on Evidence. par. 467. We live in an agricultural state, where merchants and the owners of commissaries do an extensive supply business and by custom and in the general course of this business are freely called upon to advance cash to tenants, croppers, and other employees. The business of the country is largely done on credit. In probating against the estate of decedents long accounts involving numerous transactions, the creditor is an incompetent witness in his own behalf, and by necessity must rely largely upon books of account. The reasoning, then, of Judge LUMPKIN in *Ganahl v. Shore*, 24 Ga. 24, appeals to us. It is there held that cash entries can be proven by the books the same as entries for goods sold and in making proof the same principle is applicable to cash entries as to other entries made in the usual course of the business. The court in this case observes:

“Whatever doctrine may have obtained formerly upon this subject, the world is too much in a whirl, there is too much to be done in the twenty-four hours now to allow of the particularity and consequent delay in the obtainment of receipts, etc. . . . He that so affirms is a half century behind the age in which he lives.”

In *Wilson v. Wilson*, 6 N. J. Law, 99, it is said by KIRK PATRICK, C. J.;

“Upon principle I can see no reason why a book should be lawful evidence of one item, and not of another; why it should be evidence of goods sold and delivered, and not of money paid or advanced. Why should there be witnesses called, or receipts taken, in the one case more than in the other? If necessity be pleaded for the one, may it not for the other also? For they are both transactions in the common course of business, equally necessary, and, I should think, equally frequent, or nearly so.”

This is the view taken and the doctrine approved by the Wyoming supreme court in *Lewis v. England*, 14 Wyo. 128, 82 Pac. 869, 2 L. R. A. (N. S.) 401, where the court, by VAN ORSDEL, J., observes:

"We think the great weight of modern authority is to the effect that, where cash entries appear in the general course of accounts, as a part of the regular course of business transacted, such entries should be admitted as competent evidence."

The facts in the case of *Lewis v. England* are somewhat similar to the facts of the present case. Perhaps the proper limitation is indicated by the statement of Mr. Wigmore as follows:

"The better opinion is that, while as a general rule such entries are not to be regarded as admissible, yet in particular cases the ordinary course of business may involve cash entries and they may then be used." Paragraph 1549.

Of course, the entries must be made "in the usual course of business, at or about the time the facts entered transpired," and the entries should be "original and made by a party having knowledge of the facts entered," etc. *Chicago R. R. Co. v. Provine*, 61 Miss. 288. The principles governing the admissibility of books were correctly stated by our own court in 1866 in the case of *Moody v. Roberts et al.*, 41 Miss. 74. As stated by the court in that case:

The books "will not be evidence of any charge not within the regular course of the business of the party, nor of any fact that may arise collaterally in the case."

The record of the present case gives evidence of a custom whereby the deceased obtained from time to time small items of cash from Mr. Rule; that he had these items charged to his account in the same way that goods would be obtained and charged; that the book-keeper of Mr. Rule would make out a statement of the

account at the end of every month and submit it to the deceased for his information and approval; and that the deceased did in fact receive a statement of his account every month, and made no objections to any items now appearing thereon. The integrity of the books and the correctness of the itemized account are vouched for by Mr. Burke, the bookkeeper, and his assistant, the wife of Mr. Burke. The testimony does not indicate any irregularity in the method of keeping the books or any suspicion of improper dealing appearing on the face of the books. In addition to the probative value of the books themselves, the bookkeeper had personal recollection of many of the items, and was quite positive about the correctness of all cash entries. Upon the whole record, after consideration of all objections urged against the claim of appellee, we see no cause to disturb the decree appealed from.

*Affirmed.*

---

HALL v. AMERICAN BANKERS SAFETY COMPANY.

[77 South. 526, Division B.]

CORPORATIONS. *Fraud of organizer. Secret profits. Sales. Reservation of title.*

Where an organizer of a bank contracted for the bank for a safe, with a provision in the contract that title to the safe was to remain in the seller until fully paid for, the fact that there was a fraudulent agreement between the seller and the organizer, that a fictitious price should be placed on the safe, the organizer to get the difference between the real and fictitious price, did not make the sale one to the organizer, so as to constitute a waiver of the clause of the contract as to the retention of the title, nor prevent the seller from recovering the safe from the bank where no payments thereon had been made.

APPEAL from the chancery court of Oktibbaha county,  
HON. A. J. MCINTYRE, Chancellor.

Suit in equity by the American Bankers Safety Company against W. W. Hall, receiver of the Long View Bank, to recover possession of a safe. From a decree for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

W. W. Magruder, for appellant.

The appellee cannot recover this safe under its reservation of title by contract for the manifest reason that it sold the safe vault door, and equipment to Hardin Adams for the purpose of resale.

As the authority to sustain this contention, we cite; *Columbus Buggy Co. v. Turley*, 73 Miss. 529; *Parry Mfg. Co. v. Lowenburg*, 88 Miss. 532; *Watts v. Ainsworth*, 84 Miss. 40; *Fairbanks Co. v. Graves*, 90 Miss. 453; *Merchants & Farmers Bank v. Schaaf*, 66 Mo. 402.

The fundamental propositions involved in all of these cases is that no seller will be permitted to evade the law by ingenious and specious contracts, cunningly devised to retain a title which the vendee is authorized to pass, or in other words, that complainant in this case could not retain title to a safe vault door, and equipment, for which they were contracting with Hardin Adams and authorizing him to resell to the Longview Bank, at the same time, giving the said Hardin Adams their actual aid, comfort, and co-operation in the perpetration of a nefarious and infamous scheme by which the Longview Bank was to be defrauded of its scanty funds.

Counsel for complainant appear to attach much importance to the fact that the written contract itself in this case does not contain any specific authority to Hardin Adams for the resale of the property in controversy. This position is completely answered in the case *Bank of Hazelhurst v. Goodbar*, 73 Miss. 566.

The principle involved in all of these cases is the same, whether falling specifically under section 4784, Mississippi Code of 1906, or controlled by the law as announced in the Goodbar case which is based upon the sound, legal proposition that whenever a seller clothes a buyer with the *indicia* of ownership and authority to resell, either as an integral part of the original contract or by contemporaneous parol agreement, the conveyance becomes fraudulent in law—either actually or constructively—depending upon the particular facts of each case.

Whether the buyer handles the goods upon a commission basis or for his own account, under the decisions, is absolutely immaterial. This proposition is emphatically settled, in: *Shannon v. Blum*, 60 Miss. 828; *Bank v. Studebaker*, 71 Miss. 544; *Paine v. Hall*, 64 Miss. 175; *Hall v. Berg*, 65 Miss. 187.

Counsel for complainant cited in the lower court *Gayden v. Tufts*, 66 Miss. 691, as authority for the proposition that an assignee has no better title than his assignor. That case has no bearing or value in the consideration of the instant case because the facts here differentiate this case from the Tufts case as clearly as night is differentiated from day. No equities intervened in that case and the contract there in the statement of facts on page 691, specifically shows that it was duly acknowledged and recorded in the public records of the county. This was not a secret reservation of title to the injury of creditors but constructive notice was honestly and publicly given by the official records of the state.

They also cite *Tufts v. Stone*, 70 Miss. 54, but again they are hoisted by the same petard for the supreme court in its opinion states that the written contract was acknowledged and recorded.

In *Andrews v. Partee*, 79 Miss. 80, a man by the name of Dye executed a trust deed to Moore on certain property including some saw logs, the *cestui que trust* testi-

fyiing that a contemporaneous parol agreement was made between him and the mortgagor by which the latter was to be permitted the use of the logs to finance his business "until he could get himself in shape." The court in its opinion announced, "Notwithstanding the good faith and honest purposes of both of these men, in fact, still the law denounces a trust deed hampered by such an agreement or understanding as fraudulent and void as to creditors. The rule is a hard one but it is too well settled by authority for us to disturb it.

In the instant case, complainant undertakes to rely upon an equitable mortgage created by the written contract, dated July 8, 1913, in which Hardin Adams is the grantor by operation of law as well as by the contract itself. The same parol agreement which exists in this case, as admitted by complainant, would constitute "The fly in the ointment," in the Andrews case.

The same principle is announced in *Harmon v. Hoskins*, 56 Miss. 142. Also see *Joseph v. Levi*, 58 Miss. 843, in which the court approves *Harmon v. Hoskins*, *supra*, and again emphasizes the controlling principle in this line of cases

In *Johnson v. Tuttle*, 65 Miss. 492, the court declares in the consideration of a similar case that: "The law imputes conclusively a fraudulent purpose without regard to the actual motives of the parties." The court further says: "But it is immaterial, whether the agreement or understanding. . . was expressed on the face of the instrument or appears to exist by evidence *aliunde*. In legal contemplation the effect is the same in both cases."

"*He who comes into equity must come with clean hands.*"

Complainant cannot recover in this case because of the equitable maxim, "He who comes into equity must come with clean hands." This maxim has been enforced in the courts of England and in the various states through-

out this country from time immemorial. The only difficulty that the courts have found has been in its applicability to the facts of adjudicated cases. That difficulty in the instant case will be infinitesimal because the facts clearly bring complainant's case within the condemnation of this maxim.

Care must always be taken to avoid confusion of this maxim with the similar maxim: "He who seeks equity must do equity." The analogy between the two is necessarily close but the maxim upon which we rely is far more comprehensive than the other maxim in its scope and operation.

We refer the court to Pomeroy's Equity Jurisprudence, sections 387-404.

Counsel for complainant in their brief deny the applicability of this maxim, insisting that the contemporaneous agreement of Hardin Adams with complainant was merely incidental to the contract itself and that complainant's right to recovery is based solely upon the written contract. We insist that the entire transaction between complainant and Hardin Adams is subject to the scrutiny of the court in the consideration of the rights of this defrauded bank.

We invite the careful consideration of the court to the case, *Woodson v. Hopkins*, 85 Miss. 171.

This case will illustrate the devious methods of fraud and chicanery by which cunning grafters undertake to secure "something for nothing." A careful perusal of the testimony in response to interrogatories, propounded under the statute, will in our opinion demonstrate beyond peradventure that appellee is not entitled to recovery of the property involved in this litigation.

In the records of this tribunal, this case might well in the future be styled as "The adventures of J. Rufus Wallingford." About the only difference between complainant and that genial gentleman that we are able to discover is that Wallingford did not have the temerity

to invoke the jurisdiction of the courts in the consummation of his nefarious schemes while complainant goes him one better.

Wherefore, appellant asks that the decree of the lower court shall be reversed and that judgment final shall be rendered in this cause, dismissing appellee's bill, and denying all relief as sought therein.

*Leftwich & Tubbs*, for appellee.

To begin with the findings of the chancellor and the facts must all be resolved in appellee's favor. Counsel claims as one defense that when complainant by contract sold the safe to Hardin Adams and reserved title for the purchase money, and then shipped the safe to Longview Bank, that it contracted with Adams for a resale of the safe to the bank, and thereby waived its lien, and to sustain this contention cites: *The Columbus Buggy Co. v. Turley & Parker*, 73 Miss. 529; *Watts v. Ainsworth*, 89 Miss. 40; *Fairbanks Co. v. Graves*, 90 Miss. 453; *Parry Mfg. Co. v. Lowenberg*, 88 Miss. 532.

On the other question of conditional sales, and the right of the subpurchaser of property sold on condition, we quote under this head. 6 Am. & Eng. Ency. of Law (2 Ed.), which is as follows:

"3. Of Third Persons—a Bona Fide Purchaser. Subpurchaser of property sold on condition precedent acquires no title against vendor,—except where the case is controlled by statutes providing otherwise, the general rule is that where personal property is sold and delivered to the vendee on condition that the title is to remain in the vendor until the purchase price is paid or secured, the vendee who has not yet acquired title by the performance of the condition can convey no title even to a *bona-fide* purchaser that can be enforced against the original vendor; and that the latter, if guilty of no laches, may recover the property from such purchaser from his vendee without any previous demand."



It will be seen that under this text are cited decisions from many states including the Mississippi ones, and we refer especially to the note quoted from *Coggill v. Hartford Ry. Co.*, 3 Gray (Mass.) 545, on page 488.

“Clean Hands”

We come now to the “clean hands” proposition presented in the answer and argument of the learned counsel, the charge being that the outside arrangement, lying wholly outside of the contract sued on, whereby the American Bankers Safety Co. was to bill to the Longview Bank at one thousand, four hundred and twenty-five dollars, and when the same was collected to pay all of it above eight hundred, ten dollars, to Hardin Adams and Guill Barber, was a corrupt agreement whereby complainant was colluding with Adams and assisting him in reselling these goods at a profit to the Longview Bank in violation of his trust obligation to that bank. Counsel traveled a long way from the case in attempting to show that complainant was engaged in this kind of business, but neither by independent evidence nor by cross-examination has he adduced any evidence to sustain this charge, and certainly if he had, it would be incompetent in this case. The “clean hands” doctrine, as all the text-writers and courts agree, does not apply to any kind of obliquity or illegality except that which arises out of the case in hand; the wrong must grow out of the very transaction decided; the most corrupt criminal cannot be driven out of a court of equity if he has been honest in the transaction which he is enforcing.

Take another view of this question. The only relief that the bank could have or the receiver representing the bank, would be to subject to its use the right of Adams to the share of the commissions. *Wynn v. Dillon*, 27 Miss. 494; *Trice v. Comstock*, 61 L. R. A. 176.

Counsel cites Pomeroy on Equity, 397; but we especially call the court’s attention to the limitations of the

doctrine set up in section 399, of that learned writer. The case of *Truce v. Comstock*, 61 L. R. A. 176, was a case of agency; and when the court reads it, it will be seen that distinguished counsel for appellees who won below, denounced just as vigorously the conduct of complainant, as learned counsel does here, but still the lower court was reversed, and as will be seen on page 181, the court discriminated and said:

“The acts to which defendants object neither conditioned nor affected the equity which the complainants now seek to enforce.”

So here, we argue that when this complainant seeks to retake his own goods, title to which was reserved because they have never been paid for, his doing so is in no manner conditioned upon nor affected by the scheme of Hardin Adams which he was never able to carry out to obtain a profit from his principal by having the seller of the goods pay the bill and conceal the profit. In the case of *Wooten v. Miller*, 7 S. & M. referred to by Judge WHITEFIELD in the *Woodson Case*, the distinction here claimed is plainly set out and approved by the supreme court. On page 386, of that report, the court says with approval:

“There are cases which decide that where the demand is collateral to the original transaction, as where money has been loaned to pay an illegal debt, although the lender knew the illegal purpose, he may recover of this class, are *Faikney v. Regnons*, 4 Burr; *Petrie v. Hannay*, 3 T. R., but the principle upon which they act would not be applicable here unless there had been some collateral undertaking of Robert Wooten to pay.”

In the last subdivision of the brief we assumed that the transaction here was tainted with such illegality as to affect complainant; we now argue, and the authorities are perfectly clear on the point that there was no illegality at all in so far as this complainant was concerned. The most that can be said about the American

Bankers Safety Company's participation in Adams' scheme, is that it may have suspected that Adams expected to deceive his principal or the bank of which he was the agent and president, and get a profit, which the bank could of course recover from him, is not illegal at all, and is not that form of illegality that the "clean hands" doctrine effects. *Tracy v. Talmage*, 87 A. D. 132; *Wooten v. Miller*, 7 Miss. 308; *Buck v. Albee*, 62 A. D. 564; *Tracy v. Talmage*, 67 A. D. 146-7.

On page 5 of counsel's brief he uses this language: "Upon delivery of the safe and outfit to the Longview Bank by the American Bankers Safety Co. under instructions from Hardin Adams, the title was vested in the Longview Bank by virtue of the implied contract of sale created by law from Hardin Adams to the Longview Bank."

We have studied counsel's analysis of the situation on this page of his brief with much interest. In every logical analysis there must be a sound premise; we grant that title to property must vest somewhere; there is no question in the world where the title is in this case; it was retained by complainant as security for its purchase money. There can be no question about that whatever the writing establishes it; it never did pass to Hardin Adams; it never did pass to the Bank, and there is not a word in the whole testimony showing that the purchase of the safe by the bank's officers at any price was ever discussed or even hinted at. With the legal title outstanding in the vendor and possession of the safe merely loaned to Hardin Adams; with the doctrine of *caveat emptor* standing out in all its virility, by what course of reasoning can any court conclude that the Longview Bank became the owner of the safe by an implied contract of sale. *Tufts v. Stone*, 70 Miss. 54; *Gayden v. Tufts*, 68 Miss. 691.

As decided in all Mississippi cases, from *Ketchum & Cummins v. Brennan*, 53 Miss. 596, down, the reserva-

tion of title is good against all the world, but for the sign statute section 4784, of the present code. That statute can only be invoked by creditors who have obtained a lien by attachment who have bought the property in market overt and as our court has distinctly held, the vendee himself, who is Hall in this instance, *pro hac vici*, cannot set up a claim like this receiver is trying to set up; he is a volunteer. *Ketchum v. Brannan*, 53 Miss. 596; *Duke v. Shackelford*, 56 Miss 552; *Fairbanks v. Graves*, 90 Miss. 556; 24 Am. & Eng. Enc., p. 77.

We all recognize we suppose that witness Coleman's answer was a legal conclusion of his. The chancellor simply found that the refusal of the appellee to ship or deliver the safe to Adams and all the facts, when taken together, looking through the form to the subdivision, the sale was really to the Bank of Longview; the chancellors decree was eminently just and we ask affirmance.

STEVENS, J., delivered the opinion of the court.

The controlling facts, as we interpret the record, are as follows: One Hardin Adams attempted to organize and establish a small banking institution at Longview in Oktibbeha county with a capital of ten thousand dollars. Organization was effected about August 18, 1913. Adams was likewise interested in the organization of a bank at French Camp, Miss. On July 8, 1913, Adams went to the offices of appellee, the American Bankers' Safety Company at Cincinnati, and placed an order with appellee for two bank safes, one for the Longview Bank, the other for the French Camp Bank. The written contract for the two safes and vault doors was executed by Hardin Adams individually, for a total consideration of one thousand six hundred and twenty dollars. There was a provision in the contract that "said safe to re-

main the property of the American Bankers' Safety Co. until paid for in full." The contract further provided that "safe and doors to be ordered out when wanted by Mr. Adams. These orders to be shipped when notified," and contained the further provision, "bill to Longview Bank, Longview, Mississippi, also Bank of French Camp, French Camp, Mississippi." The net price of each safe and vault door was eight hundred and ten dollars. There was an understanding, however, between Adams and appellee company, the seller of the property, whereby the latter was to render a statement to the Bank of Longview showing a larger and fictitious consideration and Adams was to receive the difference between eight hundred and ten dollars and the price which appellee should finally collect from the bank. About the time the Bank of Longview was organized, Adams ordered the safe and vault doors to be shipped to the Longview Bank, but canceled the order for the French Camp Bank. The safe was duly received by the Longview Bank and installed and accepted by the bank as its property. It appears that Adams and his brother controlled eight thousand five hundred dollars of the capital stock, but the capital stock of the bank was never in fact paid in, and there never was at any time any real basis of credit for the corporation. As stated by counsel, the bank was organized "on wind," and Adams, after realizing all he could for himself, fled the country and left the bank without assets. In this attitude a receiver was appointed to take charge of and wind up the affairs of the failed corporation. In the administration of the estate, appellee company filed a petition in the chancery court having jurisdiction of the insolvent estate, setting out the fact that petitioner had sold the safe and vault door to "one Hardin Adams, the organizer and active functionary," of the said bank, and exhibited the written contract retaining the title, and prayed that the receiver be directed to turn

over the safe to appellee as the real owner. This petition was answered by the receiver, acting for the bank, and in the answer it is averred that Hardin Adams was the real purchaser of the property at eight hundred and ten dollars; that the property was sold to Adams for purposes of resale to the bank; that appellee knew Adams intended to sell the property to the bank at a profit; that Adams conspired with appellee in having the latter bill the property to the bank at the price of one thousand four hundred and twenty-five dollars in order that Adams could make an unlawful profit of six hundred and fifteen dollars; and that appellee by its conduct had waived the provision of the contract whereby title was retained. It is further averred in the answer that Adams is indebted to the bank in approximately the sum of eight thousand dollars, which the bank ought to be permitted to offset against the purchase price of the property. Proof was taken and the issue heard and decided by the chancellor, who rendered a decree granting the prayer of appellee's petition and from this decree the receiver prosecutes an appeal.

Looking through the form to the substance, the Bank of Longview purchased the bank safe and vault door from appellee, and not from Hardin Adams. Adams at all times was acting as the promoter, organizer, or agent of the Bank of Longview. Of this appellee company was fully advised. Appellee never at any time agreed to ship Hardin Adams a safe on credit. It took an order in his name for a safe to be shipped and billed to the Longview Bank. This is evidenced by the original contract itself. Bill for the purchase price was to be sent direct to the Longview Bank and collection for the property made from the bank. The name of the Longview Bank was painted upon the face of the safe before it was shipped. Adams was not only the ostensible agent or organizer of the bank, but he in fact was the dominant voice, and had the controlling

interest in the attempted or abortive organization, and became the president and manager of the institution. The record does not show any resolution of the directors authorizing the purchase of this property, but certain it is that the bank had no contract to purchase the safe from its own president and organizer. Adams was not a trader or dealer in bank safes, and never at any time assumed to sell the Longview Bank a safe of any kind. There was fraud and shameful collusion between the American Bankers' Safety Company and Hardin Adams, whereby Adams expected to pocket a "rake-off" or unlawful commission. If this were a suit by appellee for the unlawful consideration of one thousand four hundred and twenty-five dollars, appellee could not recover. But does the fraud shown prevent appellee from repossessing its property? In the administration of the estate the receiver found and took possession of the safe with the knowledge that the property had not been paid for. In returning his inventory he stated the facts. Appellee had not been paid anything on the purchase price, and it could not, without the authority of the chancery court, bring an action of replevin. The petition in this case is an ancillary petition asking the court to direct the receiver as to what disposition he shall make of property in his possession. The bank on discovering the fraudulent understanding between appellee and Adams could have rescinded the trade; and upon doing so would return the property to the seller. The bank could also elect to pay the net price of eight hundred and ten dollars and keep the property. The court in the final decree found that if the safe was sold by the receiver it would not likely bring the purchase price of eight hundred and ten dollars, and for that reason elected to return the property to complainant. The court, we think, disposed of the controversy in a sensible way, and we see no cause to upset the result reached. Authorities on our "sign"

statute and on the legal proposition that a seller waives retained title provisions of a contract when the property sold is delivered to a trader or other person for purposes of resale have no application to the present issue. The only question in this case is whether the door of the court should be opened at all to the complainant. On this point both parties are not free from criticism. Appellee could not sue the receiver in an action of replevin without the permission of the chancellor. The bank was never legally organized, and never had any capital stock sufficient to buy a safe. On the facts of this particular record we are of the opinion that the learned chancellor was justified in returning to appellee its property.

*Affirmed.*

ETHRIDGE, J. (specially concurring). I concur in the opinion and conclusion reached in this case for the reason that the equity court had taken possession of the safe in question, and suit at law could not be maintained without an order of the court. If no receiver had been appointed the appellee could maintain a suit of replevin for the safe. Ordinarily equity would give no aid whatever to a party in the situation of the appellee.

---

GWIN ET AL. v. GWIN.

[77 South. 530, Division B.]

**PARTITION.** *Right to partition. Effect of provisions of will.*

Where a testator left the bulk of his estate to his executors to be managed by them during their lifetime, but not exceeding twenty-five years for the benefit of themselves, the testator's widow and the other children. The will further provided that on the



death of both executors but not later than twenty-five years from the testator's death, the trust should be closed up and all property divided. The estate consisted of an undivided one-half interest in real estate; the other undivided one-half of which was owned by one of the sons, who was named as one of the executors and trustees. In such case there was nothing in the will which limited the right of the son owning an undivided one-half interest in the real estate to have a partition of the lands owned by deceased, his father, and himself as tenants in common.

APPEAL from the Chancery Court of Holmes County.  
HON ALBERT Y. WOODWARD, Chancellor.

Suit by J. D. Gwin against W. K. Gwin and others, executors of S. D. Gwin, deceased. From a decree for complainants, defendants appeal.

This suit was filed in the chancery court of Holmes county for the purpose of obtaining the partition in kind of certain real and personal property, and also for the purpose of obtaining a construction by the court of the will of Samuel D. Gwin. The facts and circumstances bearing on the case are set out in the opinion of the court. The will is as follows:

"I, Samuel D. Gwin, a resident of Holmes County, Mississippi, being of lawful age and of sound and disposing mind and memory do make, publish and declare the following to be my last will and testament.

"Item 1. I hereby give, devise and bequeath to my sons John D. Gwin and Walter K. Gwin jointly and to the survivor of them during their natural lives not exceeding however a period of twenty-five years from my decease all the property real, personal and mixed which I may own at the time of my death or in which I may have then any interest present or expectant for the use and benefit of themselves, and of my wife and other children, and for the purpose of carrying out the bequests, purposes and intents hereinafter expressed. I also appoint the said John D. Gwin and Walter K. Gwin executors of my last will and testament and guardian of any minor children that I may leave. In case of the death of the said named

executors or failure of either of them from any cause to act as executor, then it is my will that the other shall act as executor of my will and guardian of my said minor children, but such acting executor shall have all the powers and perform all the duties hereby conferred and imposed on the said John D. Gwin and Walter K. Gwin jointly, and the acts and doings of said acting executor in and about the execution of this will and trust shall have the same effect as if done and performed by the said John D. Gwin and Walter K. Gwin acting either jointly or separately as trustees, executors or guardians for the discharge of their duties as such under this will. And I further will and direct that the said John D. Gwin and Walter K. Gwin or either of them shall not be required to file or furnish any inventory of my estate or property or any appraisement to any court nor shall they be required to make any settlements final or annual of their administration of my estate or of the trusts herein created through or to any court but shall make all their accountings and settlements with my heirs and devisees direct.

"Item 2. I have advanced to my sons John D. Gwin and J. E. Gwin in money and property exclusive of the property named in the next item of this will, the sum of five thousand dollars each, and if I have not prior to my death made advancements of like amount to my other children, I direct that my said executors shall pay the sum of five thousand dollars to such of my children as shall not have received from me such advancement during my lifetime. The said John D. Gwin and J. E. Gwin are not to be charged any interest on the above amount advanced to them in the final distribution of my estate.

"Item 3. I have hertofore given to my sons John D. Gwin, J. E. Gwin, Walter K. Gwin and to my daughter Mrs. J. B. Hutton each forty shares or four thousand dollars of stock in the Tehula Co-operative Store, located at Tehula, Miss., and I will and direct that if at the time of my death I shall not have given a like number of

---

Statement of the case.

[116 Miss.]

shares or stock in said store to each of my other children, then my said executors shall assign and transfer forty share or four thousand dollars of stock in said store to such of my children as shall not have received that amount during my lifetime. Any other gifts made by me to any of my children heretofore shall not be construed as advancements to them but as gifts from me.

“Item 4. The balance of my estate real, personal and mixed in possession or expectancy after the payment of all my liabilities and above bequests shall remain in the charge, possession and control of the said John D. Gwin and Walter K. Gwin, and the survivor of them during their natural lives for a period not exceeding twenty-five years from my death to be by them or the survivors managed, operated and controlled for the benefit of themselves and of my wife and my other children and for the carrying out of the bequests and purposes hereinafter named. The said John D. Gwin and Walter K. Gwin or the survivor shall have full power and authority to manage, operate and conduct my estate and various enterprises to make all proper and necessary contracts for the operation, management and conduct of same, including the power to borrow money, and to secure the repayment thereof by pledge or mortgage of my property real, personal or mixed. They or the survivor shall have the power to lease, sell and by deed of other instrument to convey for cash or otherwise any of my estate real, personal or mixed to invest the proceeds of said sale or any part thereof and the income of said properties, or my estate, after paying the specific amounts hereinafter named in anyway they or the survivors sees proper for the use and benefit of my estate.

“Item 5. Out of the income of my estate, I direct that my executors or the survivor during their or his administration of my estate shall pay my wife annually the sum of twenty-five hundred dollars or if she prefers it one-sixth of the net annual income of my estate.

They shall also pay annually out of said income during their administration of this trust the premiums on the life insurance policy of my daughter Mrs. J. B. Hutton in the Union Central Insurance Company of Cincinnati, Ohio, amounting to two hundred forty-five dollars and five cents, which amount is to be charged up as a part of the current expenses of my estate and not against my said daughter. I hereby authorize and direct my said executors to pay out of said income a sum not exceeding six hundred dollars per year or as much thereof as necessary to Mrs. Claude R. Keirn for the support of herself and daughter Nellie, if she the said Mrs. Claude R. Keirn should not be able to support herself and daughter Nellie out of her own estate. My said executors are to be the sole judges of the necessity of paying said amount or any part thereof to the said Mrs. Claude R. Keirn. I also direct my said executors out of said income shall pay the expenses of my niece Nellie Keirn whilst she is attending school or college as a student.

“Item 6. The balance of the net income arising from the operation of my estate shall in the discretion of my said executors or the survivor of them be distributed amongst my children, or reinvested, or a part may be reinvested and a part distributed as my executors shall deem best.

“Item 7. At the death of both the said John D. Gwin and Walter K. Gwin, but not later than twenty-five years from my death, it is my will that the estate and the trust hereby created be closed up as soon as practicable, and all the property then on hand including the accumulation whilst in the hands of my executors be divided between my wife and children share and share alike, a deceased child's heirs to take a deceased child's portion.

“Item 8. As long as both of my sons John D. Gwin and Walter K. Gwin jointly act as executors each shall be

paid the sum of one thousand dollars to be charged as part of the current expenses of my estate. If by reason of death or other cause only one of them shall act as executor then the one so acting as executor shall receive the sum of two thousand dollars per year for his services to be charged as part of the current expenses of my estate.

"In witness whereof I have hereunto, affixed my signature this the 17th day of February, 1904.

[Signed] S. D. GWIN.

"Signed, published and declared by the said S. D. Gwin to be his last will and testament in our presence, who at the request of said Samuel D. Gwin and in his presence and in the presence of each other have hereto set our signatures as witnesses this the 17th day of February, 1904.

"[Signed] S. M. Cox:

"J. M. JONES."

*P. P. Lindholm*, for appellants.

*Boothe & Pepper*, for appellee.

COOK, P. J., delivered the opinion of the court.

S. D. Gwin, a resident of Holmes county, died testate in 1908, and his last will and testament was duly probated. This will was construed by this court in *Gwin et al. v. Hutton et al.*, 100 Miss. 320, 56 So. 446, to which case reference is here made. The estate of the testator consisted of an undivided one-half interest in certain real estate. The owner of the other undivided one-half interest of this land was J. D. Gwin, son of the testator, and one of the executors and trustees named in the aforementioned will.

In the instant case J. D. Gwin filed a bill asking that the said real estate be partitioned in kind between himself and the beneficiaries of the will of S. D. Gwin, de-

ceased. The chancellor entered a decree sustaining the prayer of this bill, appointed commissioners to make the partition as prayed for, and on the coming in of the report of the commissioners the real estate was partitioned, and from this decree this appeal was prosecuted.

The question for our decision is thus stated in the briefs of counsel, viz.:

“Appellants desire this court to pass upon the decrees of the court below, ordering division and partition of the property owned by J. D. Gwin and the late S. D. Gwin as copartners, at the time of the death of Capt. Gwin, and whether or not the terms and conditions contained in the last will and testament of Capt. Gwin, as construed by this court in the case of *Gwin v. Hutton*, 100 Miss. 320, 56 So. 446, in any wise affect the right of J. D. Gwin as a copartner not as heir or beneficiary, to a division in kind of the joint property owned by him and his father, at the time of his death, and which had been kept together under joint control and management with the executors and trustees until the division in kind made by the chancery court of Holmes county. Since that date J. D. Gwin has been in exclusive possession of his divided half of the joint estate, and J. D. Gwin and W. K. Gwin, executors and trustees of the estate of S. D. Gwin, in exclusive possession, control, and management of the divided half of the joint property, all of which is set out in detail, item by item, in the decree of partition.”

We do not think that there is anything in the will of S. D. Gwin, deceased, which in any way limits the right of J. D. Gwin to have a partition of the lands owned by deceased, his father, and himself, as tenants in common. Quite a different question was presented in *Gwin et al v. Hutton et al.*, *supra*. In that case the court was considering the estate of the testator, and it appears in this record that his estate consisted of an undivided one-half interest in the lands mentioned in the decree, and when

the decree partitioning these lands was entered, the estate devised was then the lands set apart as the lands of the estate. Of course, as to the lands so named the trust imposed in the will must be carried out by the executor.

*Affirmed.*

---

SOVEREIGN CAMP, WOODMEN OF THE WORLD v. FARMER.

[77 South, 655, Division A.]

1. **INSURANCE.** *Mutual benefit insurance. Defenses. Misstatements in application.*

Code 1906, section 2675, (Hemmingways, Code, section 5141), requiring a copy of the application to be delivered with any policy or certificate of insurance, and providing that in default thereof the insurer shall not be permitted in any court to deny that any of the statements in the application are true, creates not a rule of evidence but a rule of substantive law, which became a part of the contract of insurance and hence applied to a benefit certificate issued while fraternal insurers were subject to its provisions, though the section was not brought forward into, Laws, 1916, chapter 206, by which fraternal orders are now governed.

2. **WITNESSES.** *Privileged communications. Waiver by contract.*

The privilege created by section 3695, Code 1906 (Hemmingways Code, section 6380), in reference to communications to physicians, is personal to the physician's patient and may be waived by him either before or at the trial, and where one of the considerations upon which a policy was issued was the waiver by the insured of such privilege, in such case his physician was a competent witness, although he obtained his knowledge of his condition while treating him professionally.

3. **TRIAL.** *Objections to evidence. Good in part.*

Where in an action on a benefit certificate with which no copy of the application was delivered, defendant could not deny the truth of the statements contained in the application, but plaintiff had waived the privilege provided by Code 1906, section 3695, in regard to communications made to his physician. In such

case, the evidence of the physician must be confined to facts tending to prove the insured's state of health after his application for the certificate was made, he could not be permitted to testify as to matters accruing prior thereto.

4. SAME.

Where objection was made to all of the testimony of a witness a part of which was competent and a part incompetent, without limiting the objection to the incompetent part, the objection should have been overruled.

APPEAL from the circuit court of Panola county.

HON. E. D. DINKINS, Judge.

Suit by Mrs. Laura May Farmer against the Sovereign Camp, Woodmen of the World. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*Watkins & Watkins*, for appellant.

The court committed error in refusing to admit in evidence and excluding from the jury the testimony of Dr. Battle Malone, and other doctors to the effect that the decedent, Farmer, at the time of the execution of the application in this case, and upon the date of delivery of the policy, was not in good health.

The application signed by the decedent contained the following statement: "I hereby certify, agree, and warrant that I am of sound bodily health and mind, that I am temperate in habits, and have no injury or disease that will tend to shorten my life. I hereby consent and agree that this application, consisting of two pages to each of which I have attached my signature, the examining physician's report and all provisions of the constitution and laws of the order now in force, or that may hereafter be adopted, shall constitute the basis for and form a part of any beneficiary certificate that may be issued to me by the Sovereign Camp of the Woodmen of the World, whether printed or referred to therein or not.



Said application contained the following stipulation: "I further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifying any physician from testifying in his professional capacity.

The contract sued upon was dated February 22, 1915, and contained the following memorandum, attached to and forming part thereof, signed and executed by the decedent, John Kendall Farmer.

"I have read the above certificate No. 80,343 of the Sovereign Camp of the Woodmen of the World, and the conditions therein, and hereby agree to accept the same as a member of Camp 958, State of Mississippi, this the 22nd day of February, 1915, and that all the requirements of section 58 of the constitution and laws of the order have been complied with."

Section 58 of the constitution and laws of the order, above referred to, contain the following language. "The liability of the Sovereign Camp for the payment of benefits on the death of a member shall not begin until after his application shall have been accepted by a Sovereign physician, his certificate issued, and he shall have: First—Paid all entrance fees; Second—Paid one or more advance monthly payments of assessments and dues, known as 'Sovereign Camp Fund;' also, signed his certificate and acceptance slip attached thereto; Third—Paid the physician for medical examination; Fourth—Been obligated or introduced by a camp or by an authorized deputy in due form; Fifth—Had delivered to him, in person, his beneficiary certificate while in good health."

"The foregoing are hereby made a part of the consideration for, and are conditions precedent to, the liability for the payment of benefits in case of death."

The testimony of Dr. Malone and other physicians which was excluded by the trial court would have es-

116 Miss.]

Brief for appellant.

tablished, if admitted, that many years prior to the application for an issuance of the certificate of insurance sued upon in this case, the member, Mr. Farmer, became afflicted with osteomyelitis or necrosis of the bone of the left leg, which means a decaying of the bone, and that the said John Kendall Farmer died within ten-months after the issuance of the said certificate, the immediate cause of his death being poisoning following an operation on such decayed bone, which testimony, if admitted, and believed by the jury if contradicted, would have established that upon the 22nd day of February, 1915, and upon the date of the signing of the application for the benefit certificate in question, the decedent was not in good health, as he contracted that he was upon the day and date of the delivery of the policy, but that he was then suffering with decayed bone, which was the immediate cause of his death.

The testimony of such doctors was competent and relevant under the issues formed in the case, but was excluded by the trial court, for the reason that such doctors, and each of them gained the information forming the subject of the testimony while attending the decedent as a physician, and that such testimony was inadmissible because of a confidential nature.

The question is squarely presented in this case as to whether or not such privilege of disclosure could be waived by the assured in his application for insurance, which formed part of the contract in the case, and as to whether or not such stipulation is binding and valid upon the beneficiary of the assured. There will be no question that the application for insurance forms part of the contract. The contract of insurance sued upon provides that the contract shall consist of the certificate of insurance the application and the constitution and by-laws of the order. And, aside from this it is universally settled in this country that the contract of a member of a fraternal order consists of; (A) His application for membership; (B) The cer-

tificate or policy of insurance; (C) The constitution and by-laws of the order itself.

We take it there will be no dissent about this proposition, but as a matter of convenience, we refer the court to the following authorities announcing such rule: *Sabin v. Phinney*, 134 N. Y. 423, 428; *Shipman v. Protected Home Circle*, 174 N. Y. 398, 409; *Van Schoonhoven v. Curley*, 86 N. Y. 187, 192; *Port Edwards, C. & N. R. Co. v. Arpin*, 80 Wis. 214-218; *Kirkpatrick v. Modern Woodmen of America*, 103 Ill. App. 468, 473; *Wallace v. Madden*, 168 Ill. 356, 360; *Fullenweider v. Royal League*, 180 Ill. 621, 625; *Baldwyn v. Begley*, 185 Ill. 180, 187; *Treat v. Merchants' Life Ass'n*, 198 Ill. 431, 435; *Supreme Lodge, Knights of Pythias v. Knight*, 3 L. R. A. 409, 117 Ind. 489; *Union Mutual Ass'n v. Montgomery*, 70 Mich. 587, 594; *Supreme Lodge K. of P. v. La Malta*, 30 L. R. A. 838, 839; 95 Tenn. 157; *Sabin v. National Union*, 90 Mich. 177, 179; *Modern Woodmen of America v. Tevis*, 117 Fed. (U. S. App. 8th Cir.) 369, 370; *In Re Globe Mutual Benefit Ass'n*, 63 Hun. 263; *Gaines v. Supreme Council R. A.*, 140 Fed. 978, 979; *Palmer v. Welsh*, 132 Ill. 141; *Relf v. Rundle*, 103 U. S. 225, 26 L. Ed. 337; *Warner v. Delbridge & Cameron Co.*, 110 Mich. 590, 594.

Section 3695, of the Code of 1906 is in the following language: "All communications made to a physician or surgeon by a patient under his charge, or by one seeking professional advice, are hereby declared to be privileged, and such physician or surgeon shall not be required to disclose the same in any legal proceeding, except at the instance of the patient."

At common law, communications between physician and patient were not privileged, but were admissible in evidence. 40 Cyc. page 2381; *Trull v. Modern Woodmen* (Idaho), 10 A. & E. Ann. Cas. 53; *Freel v. Market Street Cable R. Co.*, 97 Cal. 40, 31 Pac. 730; *Matter of Fling*, 100 Cal. 394, 34 Pac. 863; *Streeter v. Breckenridge*, 23 Mo. App. 244; *Westover v. Aetna L. Ins. Co.*,

99 N. Y., 59 Am. Rep. 1, 1 N. E. R. 104; *Renihan v. Dennin*, 103 N. Y. 573; 57 Am. Rep. 770, 9 N. E. 320; *Westover v. Aetna Ins. Co., Supra*; *Freel v. Market Street Cable Co., supra*; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552, And note on page 570; *Foley v. Royal Arcanum*, 151 N. Y. 196, 56 Am. St. Rep. 621, 45 N. E. 456; *Coleman v. —*, 111 N. Y. 220, 19 N. E. 71; *McKinney v. Grand St. etc., R. Co.*, 104 N. Y. 352, 10 N. E. 544; *Alberti v. New York, etc., R. Co.*, 118 N. Y. 77, 23 N. E. 35; *Rosseau v. Bleau*, 131 N. Y. 177, 27 Am. St. Rep. 578, 30 N. E. 52.

It has been held everywhere that the question has been passed upon, except in New York, that a stipulation by the insured waiving his statutory privilege as to communications to his physician is valid and makes the communications admissible in evidence, the stipulation is binding on both the insured and the beneficiary. *Adreveno v. Mutual Reserve Fund, L. Ass'n*. 34 Fed. 870 (Missouri Statute); *Metropolitan Life Ins. Co. v. Wills*, 37 Ind. App. 48, 76 N. E. 560; *Keller v. Home L. Ins. Co.*, 95 Mo. App. 627, 69 S. W. 612; *Fuller v. Knights of Pythias*, 129 N. C. 318, 40 So. 65. Under the waiver herein discussed, the physician becomes competent to testify to his knowledge of the disease of which the insured died, in order to show that the death was not covered by the policy, as in the case of accident insurance. *Western Travelers, Acc. Ass'n v. Munson*, 73 Neb. 858, 103 N. W. 688. The physician also becomes competent to testify to his knowledge of the state of health of the insured prior to the time of the application for the insurance, with a view to showing a breach of warranty in the application. *Modern Woodmen of America v. Angle* (Mo. App. 1907), 104 S. W. 297; *Fuller v. K. of P. (N. C.)*, 85 A. S. R. 744; *Grand Rapids, etc., R. R. Co. v. Martin*, 41 Mich. 667, 3 N. W. 173; *Foley v. Royal Arcanum*, 78 Hun 222, 28 N. Y. S. 952; *Adreveno v. Mutual Reserve, etc., Ass'n*, 34 Fed. 870; *Dougherty v. Metropol-*

*itan Life Ins. Co.*, 87 Hun 15, 33 N. Y. S. 873; *Metropolitan Life Ins. Co.*, v. *Wills and Penn. Mutual, etc., Co.* v. *Wiler*, 100 Ind. 92, 50 Am. St. Rep. 769. The identical question was presented in the case of *Keller v. Home Life Ins. Co.* (Mo.), 69 S. W. 612; *Modern Woodmen v. Angle*, 104 S. W. 297; *Metropolitan Life Ins. Co. v. Burbaker* (Kans.), 96 Pac. 62; *In re Elliott*, 73 Kans. 151, 84 Pac. 750; *Re Burnette*, 73 Kans. 609, 85 Pac. 575; *Annuity Ass'n. v. McCall* (Ark.), 146 S. W. 125; *Foley v. Royal Arcanum*, 45 N. E. 456; *Samson v. Breed*, 1 Walker, 267; *Ingraham v. Reagan*, 23 Miss. 213; *Botanico Medical Co. v. Atchinson*, 41 Miss. 188.

The court below committed error in overruling the appellant's demurrer to the plaintiff's replication to appellant's second, third, and fifth, pleas.

The appellant in this case, in its second, third and fifth pleas, in great detail alleged the execution of the application for insurance by the deceased, the fact that the same was the basis for entering into the contract sued upon, and that the assured warranted the truthfulness of the statement therein contained, and that the contract of insurance was entered into by the appellant relying upon the truthfulness of such statements. Such pleas allege and aver that the statements contained in the application of the assured were untrue, false and known by the assured to be untrue in two respects: (A) That the assured was asked as to whether or not he was in good health at the time of the signature of such application. (B) The assured was asked as to whether or not he had been attended by a physician within five years from the date of such application.

That the assured had stated that he was in good health and had not been attended by a physician within five years from such date, and that such statements were false, and known by the assured to be false in that he had been treated for a serious malady, from which he was suffering upon the date of application, and which.

eventually caused his death, within ten months from the issuance of the policy sued upon in this cause.

To these three pleas, the appellee interposed certain replications based solely upon appellant's failure to comply with section 2675 of the Code of 1906 in that the appellant had not delivered to the insured with the policy certificate or contract of insurance a copy of insured's application. Demurrers were interposed by the appellant to such replication and the demurrers overruled, and the question is presented as to whether or not it was erroneous on the part of the trial court, by its ruling upon the pleadings, to deprive the appellant of the defense sought to be set up by it to the effect that the insured had made material statements in his application for insurance, which were not only false, but known to be false by the insured.

The question is presented as to whether or not, under the facts in this case, the failure of the appellant to deliver to the assured with such policy a copy of his application, as a matter of law, debarred the appellant from showing the falsity of the material statements contained in the application. No question was made in the court as to the materiality of such statements. Nor was any question made but that unless section 2675 of the Code precluded the appellant from availing itself of such defense, the facts set up in such pleas constituted a defense to the cause of action. The appellee did not challenge the sufficiency of said pleas, either by demurrer or otherwise, but admitting by implication that the pleas set up a valid defense to the declaration, by way of confession and avoidance, admitting all the material facts alleged in said plea, filed its replication thereto alleging failure of appellant to comply with section 2675, of the Code as hereinbefore set out.

In the case of *Sovereign Camp, Woodmen of the World v. Harper*, 73 So. 87, affirmed by this court

without written opinion, on February 13, 1917, the identical question was decided adversely to the appellant. We would not ask the court to review the question, were it not for the effect of a certain act, passed by the legislature of the state of Mississippi in the meantime.

The certificate of insurance in this case was delivered February 22, 1915, the decedent died in December, 1915. The suit was filed in August, 1916. After the death of the assured, but prior to the institution of this suit, the legislature of the state of Mississippi passed chapter 206, of the Laws of 1916, section 4 of which is in the following language:

“Exemptions. Except as herein provided, such societies shall be governed by this act, and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state but for every other purpose, and no law hereinafter enacted shall apply to them, unless they be expressly designated therein.”

Our contention, stated in a concrete form is that section 2675, of the Code of 1906, making it the duty of appellant to deliver to the assured with his certificate, a copy of his application established a rule of evidence, which was subject to be repealed or modified at any time, and that when this suit was instituted and tried, such rule of evidence no longer existed as to the appellant order. Chapter 206 of the Laws of 1916, is what is known as the uniform fraternal order bill, the same having been passed by a majority of the states of the Union. The purpose of section 4 was to provide that all laws affecting fraternal orders should be found in that particular chapter, the object being that a fraternal order, in looking for statutes affecting its legal rights in Mississippi, contractual and otherwise should not be obliged to consult any other statutory law than that provided in chapter 206. Now, it will be conceded

that nowhere in said chapter is it required that a fraternal order, in delivering a certificate of insurance, delivered to the insured a copy of his application. The court below held that section 2675 was not a mere rule of evidence or the provision of a remedy and could not be changed by statute as to contracts then in existence, and such is, in concrete form, the legal question presented in this case. We respectfully submit that section 2675 of the Code of 1906, did not, and was not intended by the legislature of the state of Mississippi to confer any property right upon the holder or beneficiary of an insurance certificate. It, in no manner, was intended to or did affect the contractual relations between the parties. The liability of the appellant to the appellee is fixed in the provisions of the contract. Their obligations of the parties.

In the case of *Easterling Lumber Company v. Pierce*, 64 So. 461, 106 Miss. 672, the question was presented as to whether or not the Act of 1912, found in chapter 215 of such laws, in reference to the *prima-facie* presumption of negligence arising from certain injuries, applied to injuries occurring prior to the passage of the act. The court held that the act was a mere rule of evidence and applied although the present action was pending at the time the act was passed.

Touching the question of the retrospective construction of statutes under the subject of statutes relating to remedy and procedure, we find in 36 Cyc., p. 1213, the following statement of law: "The presumption against the retrospective construction of a statute is founded on the principle that they should not be given such a construction as will make them unconstitutional or unjust, and, therefore, as a general rule, does not apply to statutes that relate merely to remedies and modes of procedure. In 36 Cyc., p. 1217, is the following: Rules of evidence are at all times subject to modification by the legislature and statutes, making such changes as are applicable from their passage, not only to causes of



action arising thereafter, but also to actions accrued or pending at the time. It was decided in *Carothers v. Hurley*, 41 Miss. 71, that: The legislature has the power to change the rules of evidence, and to adopt new rules so as to affect past and future rights of action.

“In *Belcher v. Mhoon*, 47 Miss. 613, it was decided that: It is competent for the legislature to enact laws in respect to testimony and to shift the burden of proof by pronouncing that, if certain facts exists, the presumption shall be that certain other things connected with them were done.”

“The statute, in the case at bar, dealt only with the rule of evidence, and not with a substantive right.” The court did not err in granting the instruction. In this connection, we call the attention of the court to the fact that in the case of *Hudson v. Railroad Co.*, 48 So. 289, 95 Miss. 41, speaking through Mr. Justice FLETCHER as the organ of the court, this court held that, under section 1985 of the Code of 1906, a declaration merely alleging injury as the result of a moving train of cars stated a cause of action without charging negligence, and, still notwithstanding such construction by the court, this court held that the statute afforded only a rule of evidence.

We respectfully submit that error was committed, as hereinbefore pointed out, and we ask that the case be reversed and remanded for a new trial.

*Shands & Montgomery*, for appellee.

Dr. Malone was not a competent witness in reference to the matters he was interrogated about at the instance of the defendant below. Such testimony is prohibited by the positive terms of section 3695, Mississippi Code of 1906, which is as follows:

“All communications made to a physician or surgeon by a patient under his charge or by one seeking professional advice, are hereby declared to be privileged, and such physician or surgeon shall not be required to

disclose the same in any legal proceeding, except at the instance of the patient."

In the case of *Y. & M. V. Ry. Co. v. Messina*, 109 Miss. 143, in construing this statute, this court speaking through Justice Cook, remarked, "there is no more sacred relationship of confidence than the relationship of patient and physician, and it was in our opinion the purpose of the legislature to close the lips of the physician concerning any and everything he knows about the patient by oral communication or from physical examination of his patient . . . The physicians were acting in their professional capacity, and the plaintiff was their patient, and all communications to their professional senses are privileged and the physician however willing he may be to violate the confidence of his patient will not be permitted to do so by the wise provisions of the statute."

Counsel seek to avoid the effect of this statute by invoking a paragraph contained in the application for insurance in this case which is in the following language: "I further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifying any physician from testifying concerning any information obtained by him in a professional capacity."

A number of authorities have been cited by counsel to sustain the proposition that the protection afforded a patient under statutes of this character, are personal privileges which may be waived by the patient; and under the language of the statutes under consideration, in these particular cases and the phraseology of the clauses in the different applications constituting the waivers in the cases cited we have no quarrel, but the language of the Mississippi statute is different from the language of any statutes quoted in the decisions cited in appellant's brief. It seems clear that it was the purpose of the Mississippi leg-

islature to place a more rigid seal of secrecy upon communications of a patient to his physician than had been placed upon such communications by the statutes of any other states. *Murphy v. Independant Order*, 77 Miss. 830; *Grand Lodge v. Jones* (Miss.), 56 So. 458.

Unless the language contained in the application clearly indicated a positive agreement upon the part of Farmer, that physicians in whom he had reposed confidence might be placed upon the stand by the insurance company in an effort to defeat paying the policy of insurance it was selling him, it cannot be held to constitute an agreement that such physicians might be called as his witnesses by the adverse party. The statute says that physicians so situated are not competent witnesses and cannot be compelled to disclose information received in a professional capacity, except at the instance of the patient. Construing strictly the language in the application: "I further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifying any physician from testifying concerning any information obtained by him in a professional capacity," can it be said that it was agreed that the insurance company might call as its witness in a proceeding at law, his physician and require him to divulge professional secrets as to his physical condition? The alleged waiver does not so state. It simply waives his right in regard to disqualifying any physician from testifying concerning information obtained in a professional capacity; but is not an agreement that his physicians may be called as witnesses against him and required to divulge professional secrets. The language does not go to this extent, and nothing can be added to the language by intendment. Undoubtedly it was the purpose of the insurance company to frame a clause in its application which would bear the construction as contended for by the appellant in this case; but the statutes of other states which

have been construed by the courts of last resort, and which were evidently before its legal department when this application form was drawn, were written in a different language from ours. The language of our statute was clearly intended to be more rigid and more far-reaching than the statutes of any other state had been.

This question was raised point-blank and decided adversely to the appellant in the case of *Sovereign Camp Woodmen of the World v. Mrs. Josephine Harper*, No. 18750, on Feb. 13, 1917, and was vigourously pressed by the fourth assignment in a suggestion of error filed by the appellant in that case. We especially refer the court to the decision in that case and insist that it is conclusive of every issue raised in the case at bar. We earnestly insist that the testimony of the physicians offered by the appellant was properly excluded by the learned trial court.

But in addition to the above, the defense sought to be interposed by the fourth special plea of the appellant, is foreclosed by section 2675, Code of 1906, which provides that all insurance companies doing business in the state of Mississippi shall deliver to the insured with the policy, certificate or contract of insurance in any form, a copy of the insured's application, and in default thereof, said insurance company shall not be permitted in any court to deny that any of the statements in said application are true. I take it to be the clear intendment of this statute, that unless the insurance company delivers to the insured a copy of his application, that it will not be permitted in any court to base any defense to any action on such policy, by virtue of any statement contained in the application. In other words, in order to make the application the basis of any defense to any suit brought on the policy, a copy thereof must be delivered to the insured. The appellant in this case failed to deliver to the insured a copy of his written application.

It is not permissible in this case, even under the guise of a different issue, to assail the good health *status* of the insured established by the failure of the insurance company to deliver a copy of his application to him. All statements in the application have, *ipso facto*, become, verities, not merely for one issue in the case, but for any and all issues. We therefore insist that the insurance company having voluntarily elected to waive its right to question the condition of the insured's health, the excluded testimony is incompetent. This question was also presented and decided adversely to the appellant in the case of *Woodmen of the World v. Mrs. Josephine Harper*, No. 18750. *Sovereign Camp Woodmen of the World, v. Dismukes*, 38 So. 351.

We come now to discussion of point two raised by the appellant in this case, which is to the effect as to whether or not the failure of the appellant to deliver to the assured, with his policy, a copy of his application, as a matter of law debarred the appellant from showing the falsity of the statement contained in the application.

Counsel concedes that this point was decided against the appellant by this court in the case of *Sovereign Camp, Woodmen of the World v. Harper*, 73 So. 887; but they say since that time the legislature of the state of Mississippi by chapter 206 of the Laws of 1916, has repealed section 2675 of the Code of 1906.

This court is passing upon the validity of the statute places that construction upon the statute which will render the statute not violative of any constitutional provisions where it is possible to do so.

If chapter 206 of the Laws of 1916, is held by this court to have repealed section 2675 of the Code of 1906, in so far as said section applied to contracts made prior to the date of enactment of chapter 206 of the Laws of 1916, this court must necessarily hold that chapter 206, is void because violative of that clause of the Federal

constitution which prohibits the passage of any statute which impairs the obligation of a contract.

The law which existed at the time and place of the making of a contract and where it is to be performed enters into and forms part of it, this embraces alike those which effect its validity, construction, discharge and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable and both are parts of the obligation, which is guaranteed by the federal constitution against impairment. *Walker v. Whitehead*, 21 U. S. (Law Ed.), p. 357; *Priestley v. Watkins*, 62 Miss. 798. See also noted *Fletcher v. Peck*, 3 U. S. (Law Ed.) p. 162.

I feel as though I should apologize to the court for the rather desolatory manner in which I have presented this, the appellee's case, but when I say to the court that we have given practically all our working time for the last two weeks to the government in assisting registrants in filling out their "Questionnaires," I feel that my apology will be acceptable to the court; however, we make these points in this case: First; That the testimony of Dr. Battle Malone was properly excluded because it was irrelevant and did not tend to prove or disprove any issue in the case.

Second: That because of section 3695 of the Code of 1906, Dr. Malone and other physicians were precluded from disclosing any information they derived from the examination of Farmer while acting in a professional capacity.

Third: That the alleged waiver of Farmer in his application for insurance cannot be asserted against the beneficiary under this policy, because a copy of the application was not filed with the policy as required by section 2675, and therefore for all practical purposes was not a part of the contract of insurance in this case.

Fourth: That the language in the application for insurance was not sufficiently definite and positive as to constitute a waiver of the provision of section 3695 of the Code.

Fifth: That if chapter 206 of the Laws of 1916, is held by this court to have repealed section 2675 of the Code of 1906, that the court will place no such construction on chapter 206 as will give to it retroactive effect.

SMITH, C. J., delivered the opinion of the court.

This is an action at law instituted by appellee to recover upon a beneficiary certificate issued for her benefit to her husband, John Kendall Farmer, now deceased. In the application made by Farmer for the certificate he certified, agreed, and warranted that he was "of sound bodily health and mind," and in answer to the question, "Have you consulted or been attended by a physician for any disease or injury during the past five years?" he answered, "No." The beneficiary certificate afterwards delivered to him contained the following stipulation:

"This certificate is issued and accepted subject to all of the conditions on the back hereof, and this certificate, together with the articles of incorporation, constitution, and laws of the Sovereign Camp, Woodmen of the World, and the application for membership and medical examination of the member herein named, and all amendments to each thereof, shall constitute the agreement between the society and the member."

One of the conditions on the back thereof was that:

"If any of the statements or declarations in the application for membership, and upon the faith of which this certificate was issued, shall be found in any respect untrue, the certificate shall be null and void, and of no effect, and all moneys which shall have been paid, and all rights and benefits which have accrued on

account of this certificate shall be absolutely forfeited."

Attached to the policy was an acceptance thereof signed by Farmer reading as follows:

"I have read the above certificate, No. 80343, of the Sovereign Camp, of the Woodmen of the World and the conditions thereon, and hereby agree to and accept the same as a member of Camp 958, state of Mississippi, this 22d day of February, 1915, and warrant that I am in good health at this time, and that all the requirements of section 58 of the constitution and laws of the order have been complied with."

Appellant pleaded the general issue, and by its second, third, and fifth pleas set forth an alleged breach of the warranty of good health contained in the application for the certificate, and by the fourth an alleged breach of the same warranty contained in the written acceptance by Farmer of the certificate attached thereto. To the second, third, and fifth of these pleas appellee filed replications setting forth that she should not be barred of her action because of the matters and things set up therein, for the reason that a copy of the application had not been attached to the certificate and delivered with it to Farmer, which replications were demurred to by appellant. This demurrer was overruled, and, issue having been joined upon appellant's fourth plea, the cause proceeded to trial on the merits. At the close of the evidence peremptory instruction was granted at the request of appellee and there was judgment accordingly.

Appellee offered to prove by Dr. Malone that he had treated Farmer some time before his death for a disease of which he seems afterwards to have died, and that he also treated him at the time of his death some months after the issuance of the certificate. This evidence on motion of appellee was excluded on the ground that Dr. Malone was incompetent to testify because of section 3695, Code of 1906 (Hemingway's



Code, section 6380). Counsel for appellant then stated to the court that he had several witnesses present by whom he could prove that Farmer was not in good health "at the time of his receipt of the certificate sued on," but that they were physicians and had obtained their knowledge from Farmer while treating him professionally. The introduction of these witnesses was objected to by counsel for appellee and the objection sustained. The application made by Farmer for the issuance of the certificate contained the following stipulation:

"I further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifying any physician from testifying concerning any information obtained by him in a professional capacity."

This certificate was delivered to Farmer on the 22d day of February, 1915, at which time fraternal orders came within the provisions of section 2675, Code of 1906 (Hemingway's Code, section 5141), requiring the delivery "to the insured with the policy, certificate, or contract of insurance in any form a copy of the insured's application," and providing that "in default thereof said life insurance company shall not be permitted in any court of this state to deny that any of the statements in said application are true," but prior to the trial in the court below chapter 206, Laws of 1916, had been enacted, by which only are fraternal orders now governed, and which contains no provision requiring a delivery to the insured of a copy of the application on which the policy was issued.

The errors assigned and argued are: First, that the court erred in overruling the demurrer to appellee's replications to appellant's second, third, and fifth pleas; and, second, that the court erred in excluding the testimony of the physicians.

The ground upon which it is claimed that the demurrer should have been overruled is that section 2675 of the Code of 1906 (Hemingway's Code, section 5141), creates only a rule of evidence which was repealed by not being brought forward into chapter 206, Laws of 1916. This section of the Code creates not a rule of evidence, but a rule of substantive law, for it deals not with the method of proving a fact, but with the substantive rights of both the insurer and insured under a policy which has been delivered to the insured without a copy of the application therefor attached thereto, and its provisions became a part of the contract here entered into to the same extent as if appellant had expressly agreed in its certificate not "to deny that any of the statements in said application are true." The demurrer therefore was properly overruled.

The privilege created by section 3695, Code of 1906 (Hemingway's Code, section 6380), is personal to the physician's patient, and may be waived by him either before or at the trial, and, since one of the considerations upon which this policy was issued was the waiver by Farmer of such privilege, it follows that his physicians were competent witnesses, although they obtained their knowledge of his condition while treating him professionally. *Trull v. Modern Woodmen*, 12 Idaho, 318, 85 Pac. 1081, 10 Ann. Cas. 53; *Fuller v. K. of P.* 129 N. C. 318, 40 S. E. 65, 85 Am. St. Rep. 744; *Adreveno v. Mutual Reserve Ass'n* (C. C.), 34 Fed. 870; *Keller v. Home Life Ins. Co.*, 95 Mo. App. 627, 69 S. W. 612; *Modern Woodmen v. Angle*, 127 Mo. App. 94, 104 S. W. 297; *National Annuity Ass'n v. McCall*, 103 Ark. 201, 146 S. W. 125, 48 L. R. A. (N. S.) 418; *Metropolitan Life Ins. Co. v. Willis*, 37 Ind. App. 48, 76 N. E. 560; *Bryant v. Modern Woodmen*, 86 Neb. 372, 125 N. W. 621, 27 L. R. A. (N. S.) 326.

This evidence, however, must be confined to facts tending to prove Farmer's state of health after his appli-

cation for the certificate was made, for, as herebefore set forth, appellee cannot now deny the truth of the statements contained in the application, and because of the statute hereinbefore referred to the case in all respects must be tried upon the theory that Farmer was in good health when the application was made. The testimony of the physicians, therefore, was competent in so far as it dealt with matters occurring after the making of the application, but not in so far as it dealt with matters occurring prior thereto, and, since the objections to this testimony were not limited to the incompetent portions thereof, they should have been overruled.

*Reversed and remanded.*

---

BROOKS & MYERS v. GULFPORT GROCERY Co.

[77 South 657, Division A.]

1. **SALES.** *Question for jury.*

Where there is a conflict in the testimony offered by the plaintiff and defendant on the issue of *nil debit*, the issue should be submitted to the jury.

2. **SALES.** *Actions. Liability.*

In a suit for the price of feedstuff, the mere fact that a letter from the defendant to plaintiff acknowledged the indebtedness sued for and promised to pay same, was not conclusive against the defendant, under the facts herein, for the reason that if there was no liability on the part of defendant before the letter was written, there could be none afterwards, because of no consideration.

3. **SAME.**

While such a letter was competent evidence, to be considered by the jury, tending to show that defendants did purchase of, receive from, and were indebted to plaintiff in the amount sued for, yet it would not be conclusive as against the testimony of the defendants that they did not purchase or receive the bill of feedstuff from plaintiff and were not indebted to plaintiff for it.

APPEAL from the circuit court of Simpson county.

HON. W. H. HUGHES, Judge.

Suit by the Gulfport Grocery Company against Brooks & Myers. From a judgment for plaintiff, defendants appeals.

The facts are fully stated in the opinion of the court.

*A. M. Edwards*, for appellant.

The first assignment of error is that the court erred in granting a peremptory instruction for the plaintiff. We believe this assignment of error is well taken for the reason that evidently upon the evidence adduced in this case, the case should have been submitted to the jury. George W. Brooks defendant in the court below and appellant here testified that he nor his partner, Mr. Myers did not order the bill of stuff in question from the Gulfport Grocery Company, appellees; he says that Mr Turnage ordered it shipped to him and his partner, Myers, but it was to be charged to Mr. Turnage, and that he was to pay for it. He says that Brooks & Myers never got the stuff.

Mr. Myers the other defendant testified in substance to that of Mr. George W. Brooks, stating positively that the firm of Brooks & Myers, appellants did not buy nor receive the goods, and that they did not owe the debt and that the said Mr. E. H. Shelby acknowledged that he knew and understood how it was; that it was shipped to Brooks & Myers, but charged to Mr. Turnage.

We submit that if the statements of Brooks & Myers, are true then they are not liable for this indebtedness.

We now wish to call the court's attention to the letter written by George W. Brooks to the Gulfport Grocery Company a copy of which appears on Record page 24 and is in the following words and figures to wit.

Brief for appellee.

[116 Miss.]

Shivers, Miss., 10-12

Gulfport Gro. Co.,

Gulfport, Miss.,

GENTLEMEN:

With reference to your letter of the 8th, you need not be afraid of getting the ninety-two dollars but owing to slow collections have been unable to settle sooner but will say this will be paid in next few days.

Yours truly,

BROOKS &amp; MYERS.

Mr. Brooks says that he wrote this letter and gives his reasons for writing it. He testified that Mr. W. C. Turnage had received a dun from the company and told him to write the letter. He said that the said company understood that he did not owe the debt, and that Mr. Turnage did owe it, because he said that he had explained to him, that is to the said Mr. Shelby at Shivers some time before; and said he did not think it would amount to anything under the circumstances, because the said company fully understood that it was not their bill.

We submit that under these circumstances the letter does not bind these appellants to pay this indebtedness, which might have been thought by plaintiff in the court below a ground for his motion for the peremptory instruction.

I submit that this case should have been submitted to the jury under proper instructions of the court; and as this was not done the judgment of the lower court should be reversed and the case remanded for a new trial.

*Fred M. Bush*, for appellee.

Peremptory instruction should have been granted. There is no issue of fact. The letter above quoted was written after the last visit of Mr. Shelby, and even

granting for the sake of argument only that there was some controversy as to who owed this debt prior to the writing of this letter, our contention is that this letter closed the matter just as effectively as would have a promissory note. We repeat that the testimony in this case is not such as to raise a question of fact, but merely an effort on the part of appellants to get away from the facts that they themselves have established.

As to the second and third assignments relied upon by appellants, we will merely say that at the trial of this cause only the plea of the general issue was filed and there can be no question raised as to correctness of amount.

There was never any complaint made by appellants of improper delivery by the railroad company. The assumption is that either the appellants or their agents got the goods. By their failure to complain they automatically deprived this appellee of the right to complain of improper delivery by the railroad company, if such there was. It will be noted that even if we accept Mr. Brooks' explanation for writing this letter, his explanation shows that he was intending to assist another to perpetrate a fraud on this appellee, in that he was trying to assist Mr. Turnage to buy in this account for less than it was worth.

As we have above stated, if we grant that every word of their testimony in court is true still they cannot complain, for they are faced by their own acts on every hand which condemn their words.

The case, it appears to us, was fairly tried and the decision should be affirmed.

HOLDEN, J., delivered the opinion of the court.

The appellee, Gulfport Grocery Company, recovered a judgment in the lower court for ninety-two dollars against Brooks & Myers, appellants, in a suit on an

account for a bill of feedstuff claimed to have been sold and delivered by appellee to appellants.

The appellants complain here that the lower court erred in granting a peremptory instruction to the jury to find for the plaintiff below, as there was a denial of the debt by appellants, and a conflict in the testimony introduced as to a liability on the part of appellants, and for that reason the case should have been submitted to the jury for their determination.

We shall state the substance of the testimony offered in support of the claim by the plaintiff below, and the testimony offered by the defendants as a defense in the suit.

Appellants' testimony shows that W. C. Turnage & Co., general merchants at Shivers, Miss., on the Gulf & Ship Island Railroad, ordered the bill of feedstuff here in question over the telephone on their account to be shipped to the appellants, Brooks & Myers, lumber manufacturers, a copartnership business at Shivers. Turnage & Co. handled a large per cent. of the business of appellants, and furnished them with feedstuff and other things necessary in carrying on their mill business. That appellants did not receive the feedstuff. When the bill for ninety two dollars here in question was presented for payment to the appellants, Brooks & Myers, they refused to pay it, claiming by their testimony that the Turnage Company was liable for the amount, because it was the duty of the Turnage Company, under an agreement, to furnish said feedstuff to appellants, and that appellants obtained the feedstuff from the Turnage Company, and not from appellee, and, consequently did not owe anything to appellee, as they (appellants) did not contract or purchase the feedstuff from appellee, but that the bill was shipped at the instance of the Turnage Company and should have been charged to Turnage & Co. That appellants did not receive any of the feedstuff from appellee, but that they received some of it from

Turnage & Co., and appellants were to settle with and were liable to Turnage Company for the feedstuff. The appellee contends, and shows by its testimony, that the bill of feedstuff was ordered by the appellants over the phone, and was shipped to the appellants, Brooks & Myers, and charged to Brooks & Myers. That the agent of appellee called upon Brooks & Myers for settlement of the bill, and that appellants did not deny liability. The appellee introduced in evidence a letter from Brooks & Myers, which was written some time subsequent to the date when appellee's agent had called upon Brooks & Myers for a settlement. We here quote the letter:

"Shivers, Miss., 10/12.

"Gulfport Grocery Co., Gulfport, Miss.—Gentlemen: With reference to your letter of the 8th you need not be afraid of getting the ninety-two dollars, but owing to slow collection have been unable to settle sooner but will say this will be paid in the next few days.

"Yours truly,

BROOKS & MYERS."

It is contended by the appellee that this letter is conclusive proof of the liability of the appellants for the amount in suit; that because this letter, acknowledging the indebtedness and promising to pay it, was subsequent to any controversy between the parties as to who was liable, that it could not be successfully contradicted and overcome by testimony of appellants at the trial. The lower court seemed to have taken this view when it granted the peremptory instruction complained of.

It seems clear to us that this case should have been submitted to the jury for their determination as to whether or not the appellants were liable to appellee for the amount sued for, for the reason that there is a conflict in the testimony offered by the appellant and appellee in the lower court on the issue of *nil debit*. If the jury believed from the testimony that Brooks & Myers purchased and received the bill of feedstuff from appellee, and thereby agreed and obligated themselves,



expressly or impliedly, to pay to appellee the sum of ninety-two dollars for same, then the verdict should have been for appellee. But if the jury believed from the testimony offered by the appellants that no purchase was made by appellants of the feedstuff from appellee, and that appellants purchased and received it from Turnage & Co., and that the sale was made by appellee to Turnage & Co., and appellants were to settle with Turnage & Co. for the feedstuff, then they should return a verdict for the appellants. If the jury believed the testimony of appellants, then no contractual obligation existed between appellant and appellee, either express or implied. The testimony in the case offered by both sides presents a conflict which should have been submitted to the jury.

The fact that the letter from Brooks & Meyers to appellee acknowledges the indebtedness of ninety-two dollars and promises to pay same is not conclusive against the appellants in this case; for the reason that if there was no liability on the part of appellants before this letter was written, there could be none afterwards, because of no consideration. While this letter is competent evidence, to be considered by the jury, tending to show that the appellants did purchase of, receive from, and were indebted to appellee in the amount sued for, yet it would not be conclusive as against the testimony of the appellants that they did not purchase or receive the bill of feedstuff from appellee, and were not indebted to appellee for it. This letter, in connection with the other testimony offered by the appellee in the lower court, would only be proof, subject to contradiction, that the appellants purchased and received the feedstuff, and thereby obligated themselves to pay appellee for it.

*Reversed and remanded.*

## WILLIAMS ET AL. v. MOOREHEAD. ET AL.

[77 South. 658, Division A.]

1. *WILLS. Contest. Instructions. Burden of proof.*

Where a will which had been duly filed for probate and was admitted to probate by the chancery clerk in vacation was being contested on the ground that the testator had made a subsequent will revoking the first, an instruction for the contestants, "that if the whole evidence in the case leaves it doubtful whether the will probated and now being contested was the true last will of deceased, the jury should find against its validity; for it is incumbent upon the proponents of the said will by a preponderance of the evidence to reasonably satisfy the minds of the jury that the instrument was in truth the last will of deceased;" was erroneous because the burden of proof was not upon the proponents to disprove the validity of the subsequent will, but it was upon the contestants to show affirmatively that the alleged subsequent will sought to be proven orally by contestants, was legally and validly executed in all respects as required by law; and unless this burden was met by contestants, the former valid, probated will was not revoked, but should prevail as the last will and testament of deceased.

2. *WILLS. Execution. How proved. Code 1906, section 1991.*

Under Code 1906, section 1991 (Hemmingways Code, section 1656), providing that the due execution of a will must be proved by at least one of the subscribing witnesses when present in person, where such attesting witness cannot be procured, or refuses to testify or denies the execution of the will, such execution may be established by other proof.

APPEAL from the chancery court of Newton county.

HON. G. C. TANN, Chancellor.

Bill by Leona Moorehead and others against John Williams and others. From a verdict for complainant, defendants appeal.

The facts are fully stated in the opinion of the court.

*Byrd & Byrd*, for appellants.

*Wilson & Johnson* and *J. B. Hillman*, for appellees.

HOLDEN, J., delivered the opinion of the court.

This cause was commenced in the chancery court of Newton county, and is a controversy over, and contest of, the validity of the probated will of John D. Williams, deceased. John D. Williams executed a will of date November 27, 1914, bequeathing all his property to the appellants, who were his younger children. The testator died January 16, 1916, and his said will was duly filed for probate, and was admitted to probate by the chancery clerk in vacation. Following the probate of this will in common form, the appellees, who were the older children of the deceased, and who did not take under this will of the testator, filed a bill, contesting the validity of the said probated will, alleging and claiming that the said will was expressly revoked by a subsequent will of the deceased made in December, 1915, in which the appellees were made legatees along with the other children of the deceased. The issue of *devisavit vel non* was made up between the proponents and the contestants, and testimony was submitted by proponents establishing the validity of the probated will; and oral testimony was submitted by the contestants tending to establish the subsequent will, which contained an express revocation of the former testament. The oral testimony of contestants went to show that the subsequent will was seen by several witnesses before the death of the testator, but that after his death the will could not be found, and secondary proof of its contents by oral testimony was allowed by the court. There appearing to be a conflict in the evidence, the issue was submitted to the jury, who found a verdict in favor of the contestants. From this finding of the lower court the proponents appeal here.

The appellants assign several errors of the trial court, one of which, at least, we think is well grounded; and as several of the other questions presented may never arise again, we shall discuss only two of the assignments, which will reverse the decree of the lower court and grant a new trial of the case.

First. It is contended that it was error to grant the following instruction, No. 3, to the contestants in the lower court:

"The court charges the jury at the request of contestants, that if the whole evidence in the case leaves it doubtful whether the will probated and now being contested was the true last will of John D. Williams, the jury should find against its validity; for it is incumbent upon the proponents of the said will by a preponderance of the evidence to reasonably satisfy the minds of the jury that the instrument was in truth the last will of deceased. (Given.)"

This instruction, in effect, not only imposes the burden of proof on the proponents to legally establish the will probated by proponents, but goes further and requires the proponents to affirmatively show, by a preponderance of the evidence to the satisfaction of the minds of the jury, that the alleged subsequent revoking will set up by oral testimony by contestants, was not regularly and legally executed by the deceased. It also instructs the jury "that if the whole evidence in the case leaves it doubtful" as to whether the probated will was the true last will of deceased, they should find for contestants. This instruction was erroneous because the burden of proof was not upon the proponents to disprove the validity of the subsequent will, but it was upon the contestants to show affirmatively that the alleged subsequent will sought to be proven orally by contestants was legally and validly executed in all respects as required by law; and unless this burden was met by contestants, the

former valid, probated will was not revoked, but should prevail as the last will and testament of deceased.

We may make it clearer by directing attention to the fact that the will, probated first in common form and then in solemn form by the proponents, was regular in all respects and was legally and validly established, as required by our statutes; and the jury were so instructed by the lower court in the following instruction:

“The court instructs the jury that the will of John D. Williams, deceased, now being contested, is a good and valid will. (Given.)”

Therefore, it seems clear to us that after the will was duly and legally established in solemn form by the proponents, and the court having recognized its validity after hearing all of the evidence submitted by proponents to establish it, the burden then rested upon the contestants to overcome this perfect will, legally probated and established; by showing affirmatively by a preponderance of the evidence that it was revoked by a subsequent will legally executed and attested in the same manner required of the former will. 1 *Jarman on Wills* (3d Am. Ed.), p. 186, note; 40 Cyc. 1177; 30 Am. & Eng. Enc. Law (2d Ed.), 625; *Wilburn v. Shell*, 59 Miss. 205, 42 Am. Rep. 363; *Hairston v. Hairston*, 30 Miss. 277; *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650; sections 5078, 5079, Code of 1906; sections 3366, 3367, *Hemingway's Code*.

The serious error in this instruction No. 3 becomes more apparent when we consider the oral proof in this record offered by contestants to establish the due execution and legal validity of the lost subsequent will. This testimony is far from being clear and satisfactory with reference to whether or not the will offered to be proved by the contestants was a legally and validly executed and attested will, under the requirements of our statutes. It appears that this will was lost, whether before or after the death of the deceased the record does

not disclose. And whether or not the testator is legally presumed to have destroyed the will before his death, since it was not seen after his death, is a question of law that we point out, but do not pass upon now, as it was not raised by the litigating parties. The testimony of the different witnesses for the contestants was rather loose, uncertain, inconclusive, and contradictory as to what the lost will contained and provided. The date of its execution was not shown to have appeared in the instrument. The witnesses for contestants testified that they saw this subsequent will about one week before the death of the testator, and that it was signed by the testator and attested by two witnesses whose names are Jeff Scott and Pleas Williams. No witness testified that they saw Jeff Scott or Pleas Williams sign the will as witnesses, nor did any witness testify specifically that the will contained the signatures of Jeff Scott and Pleas Williams, but the nearest that any testimony comes to establishing the signatures of these two attesting witnesses was the testimony of two witnesses, one of whom when asked, "Who signed that will as witnesses?" answered, "Jeff Scott and Pleas Williams." The other witness said:

"Q. You say Mr. Pleas Williams' name and Jeff Scott's name was on that will as witnesses? A. Yes, sir. Q. Who signed that will as witnesses? A. Mr. Pleas Williams and Mr. Scott."

Nowhere in the record do we find that any witness testified specifically that the names of the attesting witnesses and the testator appearing on the will were the signatures of Pleas Williams and Jeff Scott and the testator, nor does any witness say that he knew of his own knowledge that these two men, Williams and Scott, signed this will as attesting witnesses. Jeff Scott and Pleas Williams were the attesting witnesses on the former will probated by the proponents, and they testified to the execution of that will offered by the proponents;

but they denied emphatically that they saw the deceased sign the subsequent will here in question, and testified that they did not sign any such will as witnesses thereto, and had no knowledge whatever of the existence of any such subsequent will executed by the deceased.

Second. Appellants contend that the due execution of a will can be proven only by the testimony of the attesting witnesses, or one of them, if present in person. That is not the law. The provision of section 1991, Code of 1906, section 1656, Hemingway's Code, that "the due execution of the will must be proved by at least one of the subscribing witnesses" when present in person does not mean that the will cannot be proved by other means and testimony, where the subscribing witnesses refuse, for any reason, to testify to the execution of the will, as in such event it follows, in effect, that none of the subscribing witnesses can be produced "to prove the execution of the will," as provided in said section. If the statute were construed otherwise, cases might arise where the solemn will and intent of the testator with reference to the disposition of his property would be defeated by the hostile attitude of the subscribing witnesses who in fact attested the will which was signed by the testator, and thus destroy the very purpose of the law with reference to proof of the execution of wills.

We understand the law to be that ordinarily a will should be proved and established by at least one of the subscribing witnesses. However, we hold that while this is the rule, yet should the attesting witness be dead or beyond reach of the court and this testimony cannot be secured, or if they be present in court and become hostile to the proponents of the will and either refuse or fail to testify to the execution of it, or deny the execution of the will and deny the attestation, still the proponents of the will may offer other proof to establish its valid execution by showing by competent testimony that the testator signed it, or that it contains his signature, and that the

signatures of at least two of the witnesses are the genuine signatures of the persons purporting to be witnesses thereto, and by such proof the will may be legally probated and conclusively established by the court. 2 Wigmore on Evidence, section 1302; 1 Alexander on Wills, section 508; 40 Cyc. 1303.

The testimony in this case offered by the contestants, liberally interpreted, tends to show that the two names appearing upon the will as attesting witnesses were the signatures of Jeff Scott and Pleas Williams, and that the will contained the signature of the testator. This testimony can be reasonably construed to mean that the witnesses recognized the signatures of the testator and the two attesting witnesses as their signatures on the subsequent will in question; and the two attesting witnesses, Pleas Williams and Jeff Scott, having denied under oath that they signed the will as witnesses, presents a sharp conflict in the testimony on the issue involved, which must be submitted to a jury, under proper instructions, for their determination. This being true, it was highly important that the instructions of the court to the jury should have announced the law correctly as to the burden of proof; and the instruction granted to the contestants by the court, telling the jury that the burden of proof was upon the proponents, in view of the testimony in this case, was erroneous and particularly harmful to the case of proponents in the lower court, and may have brought about a wrong result in the decision of the questions of fact.

The decree of the lower court is reversed, and the cause remanded.

*Reversed and remanded.*



## WARREN-GODWIN LUMBER Co. v. POSTAL TELEGRAPH-CABLE COMPANY.

[77 South. 801, Division B.]

1. TELEGRAPHS AND TELEPHONES. *Stipulations as to liability. Effect.*

A telegraph company cannot contract against its own negligence and a stipulation on the back of a telegram undertaking to exempt the telegraph company from liability for its negligence in transmitting a message, though an unrepeatd one, is invalid and the company is responsible for losses occasioned by its negligence in transmission.

## 2. SAME.

In such case the amount of recovery will not be limited by the amount paid for the transmission of the telegram although there was a stipulation to that effect on the back of the message.

APPEAL from the circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Suit by the Warren-Godwin Lumber Company against the Postal Telegraph-Cable Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

G. E. Williams, for appellant.

The actual damage to appellant is admitted, and in the trial of the case below appellee did not contend that under ordinary circumstances, or under the common law of the state, the facts admitted did not show liability on the part of appellee, sufficient to warrant the rendition of a judgment for appellant in the amount demanded in the declaration as damages, but appellee contended that the act of congress of June 18, 1910, had the effect of suspending and displacing state regulations and laws with reference to telegraph business. While this is not definitely shown in the record, this

was the only contention made, and on this point the court found in favor of appellee.

Since the instant case was tried in the lower court this court has settled the question involved. In the case of *Dickerson v. Western Union Telegraph Co. et al.* the court, in a learned opinion by Mr. Justice ETHRIDGE, said: "Reverting to the Act of 1910, set out above what statute of the United States regulates liabilities, rights and duties between the telegraph company and its patrons? It is elementary that there is no federal common law, and that the powers of the federal government are delegated ones, and it must by statute prescribe the rules and regulations of a subject committed to its care. . . . The federal government in cases where Congress has not acted, enforces rights in matters brought before it within its jurisdiction, according to the laws of the states, but does not in all cases, follow the state court's interpretation of what the common law is. In some of the decisions—certainly the rights, duties and obligations imposed by the Act of 1910, whatever they may be, must be enforced according to the laws of the state where the cause of action originated as congress has not provided specifically what are those duties and rights, nor provided how and in what courts they should be exercised and enforced. *Dickerson v. Western Union Tel. Co. et al.*, 74 So. 779.

We respectively submit that this case should be reversed and judgment entered here for the amount sued

*J. N. Flowers and H. C. Holden*, for appellee.

We contend that congress by the amendment of June 18, 1910, to the act to regulate commerce, took over the regulation and control of the interstate commerce of telegraph companies.

On June 18, 1910, congress amended the Interstate Commerce Act of 1887, and the said amendment made telegraph and telephone companies engaged in sending messages from one state to another common carriers within the meaning of the amended act. (See Fed. Stat. Ann. 1912, Supp., Vol. 1., page 112.)

Among other provisions of the amendment is the following: "All charges made for any service rendered or to be rendered in the transportation of passengers or property and for transmission of messages by telegraph, telephone or cable as aforesaid, or in connection therewith, shall be just and reasonable and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; provided, that messages by telegraph, telephone or cable subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages." 1 Fed. Stat. Ann. 1912 Supp., page 113.

The effect of this legislation, we submit, is to give to Congress exclusive right of regulation and control of the interstate business of telegraph companies. *Haskell Implement Company v. Postal Telegraph-Cable Company*, 96 Atl. 219; *Western Union v. Bank of Spencer*, 156 Pac. 1175; *Gardner v. Western Union*, 230 Fed. 405; *Bailey v. Western Union*, 156 Pac. 716 (Kan.); *Western Union v. Bailisoly*, 115 Miss.,—, 82 S. E. 91; *Western Union v. Banks*, 83 S. E. (Va.) 424; *Strauss Iron Company v. Western Union*, 23 District Court (Phila.) affirmed 59 Pa. Super. Ct. 122; *Western Union v. Johnson*, 171 S. W. (Ark.) 859; *Western Union v. Holder*, 174 S. W. (Ark.) 552; *Western Union v. Dant*, 42 Wash. L. Report 722; *Western Union v. Campton*, 169 S. W. 946; *Western Union v. Simpson*, 174 S. W. 232; *Western*

*Union v. Stuart*, 179 S. W. 813; *Western Union v. See*, 192 S. W. 70.

Division B of the court in *Western Union v. Bassett*, 71 So. 11 thus decided:

"The contract in question for the dispatch of this message was made May 14, 1909, and is controlled by the laws then in force. It was by an act of Congress approved June 18, 1910, that telegraph, telephone and such companies were included in the public service agencies under federal control volume 36, p. 544, U. S. Statutes at Large."

We now submit a number of cases decided by the state courts since the decision in the *Dickerson* case. Without an exception, these cases hold that Congress has taken over the regulation and control of the interstate business of telegraph companies to the exclusion of state control. *Western Union v. Schade*, decided March 3, 1917, by the Supreme Court of Tennessee. See 192 S. W. 924; *Durre v. Western Union*, 161 N. W. (Wis) 755; *Meadows v. Postal Telegraph Company* not reported (see suggestion of error, page 12 in *Dickerson* case); *Western Union v. Tobert E. Lee*, 192 S. W. (Ky.) 70; *Gardiner v. Western Union*, 231 Fed. (U. S. Supreme Court) 405; *Western Union v. Foster*, 113 N. E. (Mass.) 192; *Western Union v. Hawkins* 76 So.—. See reply brief or postal company in *Dickerson* case for full opinion. *Poor v. Western Union*, 196, S. W. 28.

We contend that Congress having exercised its power to regulate the interstate commerce of telegraph companies, appellee's liability is governed by federal law and the decisions of the federal courts and not by the law as laid down in the state courts.

In the recent case of *Southern Express Company v. Byers*, reported in the advance sheets of the Lawyers Corporative Company of the date of May, 1, 1916, to be incorporated in Vol. 60 of the Law Edition, the court held that all rights and all liability together with the measure

of damages are to be determined by the federal courts in conformity of common-law principles as interpreted by the federal courts. *M., K. & T. v. Harriman*, 57 Law Ill. 690; *Jones v. Southern Express Company*, 61 So. 165; *Frisco Railroad Company v. Woodruff Mills*, 62 So. 171.

Third Contention. We contend that the stipulation against liability above a certain sum contained in the contract in this case is a valid stipulation, and appellant is therefore not entitled to recover damages above such sum. *Primrose v. Western Union*, 154 U. S. 1, 38 Law Ed. 883; *Bailey v. Western Union*, 156 Pac. 716; *Chicago, B. & O. Ry. Co. v. Miller*, 57 Law Ed. 323; *M., K. & T. R. Co. v. Harriman*, 57 Law Ed. 690; *K. C. Southern Ry. Co. v. Clark*, 57 Law Ed., 683; also see notes 44 L. R. A. (N. S.) 257, 50 L. R. A. (N. S.) 819.

We also contend, in this connection, that the reasonableness and validity of this stipulation in the contract is not a question for this court to decide but this question must be first raised before the interstate commerce commission. *Williams v. Western Union*, 203 Fed. 140; *Texas & Pacific v. Abilene Cotton Co.*, 51 Law Ed. 553; *B. & O. R. Co. v. United States*, 54 Law Ed. 292; *Texas & Pacific v. Mugg*, 50 Law Ed. 1011; *Interstate Commerce Commission v. Illinois Central*, 54 Law Ed. 280.

Summary. Briefly summarizing our argument thus far made, we have shown, supported by ample authorities: First, that Congress has taken over the regulation and control of the interstate business of telegraph companies to the exclusion of state regulations and control; second, that, this being true, the law as laid down in the federal courts, must govern this case; third, that under the law as laid down by the federal courts the stipulation against liability in this contract between appellee and appellant is valid and reasonable.

ETHRIDGE, J., delivered the opinion of the court.

Warren-Godwin Lumber Company, a corporation under the laws of the state of Mississippi engaged in manu-

facturing and selling lumber, addressed the following telegram to the D. J. Peterson Lumber Company, of Toledo, Ohio:

"Offer three transit cars eight inch two shiplap twenty-two dollars, answer quick. Warren-Godwin Lumber Co."

This telegram was delivered to the postal Telegraph Company at Jackson, Miss., and the message fee paid but in transmitting the message to the D. J. Peterson Lumber Company the word "two" was left out, and made the telegram read "twenty dollars" instead of "twenty-two dollars." On receipt of the message in this form that company replied as follows:

"Message received. Can book our order three transit cars eight inch two shiplap if good grade soda dipped or kiln dried at your price. Billing to ourselves Derrick, Ills., care Clover Leaf."

The message sent from Jackson to the D. J. Peterson Lumber Company contained the stipulation on the back thereof providing that the company's liability for error in sending an unrepeatd message would be limited to the amount paid for the transmission of the message. The Warren-Godwin Lumber Company shipped the lumber as directed to the Peterson Lumber Company, and presented its bill for twenty-two dollars per thousand, but that company declined to pay the two dollars per thousand. It is admitted that the amount of loss suffered by the plaintiff is one hundred twenty-five dollars and twenty-eight cents, and it is agreed that the telegraph company tendered back the amount paid for the transmission of the telegram. The case was tried below before a special judge on agreed statement of facts, jury being waived, and the judge rendered judgment for the telegraph company. The cause was decided before the decision by this court in the case of *Dickerson v. Western Union Telegraph Co.*, 114 Miss. 115, 74 So. 779, and the appellee admits that, unless the *Dickerson* Case is overruled, the appellant is entitled to judgment, but insists that the

Dickerson Case should be overruled. This court decided in the case of *Posttl Telegraph Co. v. Wells*, 82 Miss. 733, 35 So. 190, that the company could not contract against its own negligence, and that the stipulation on the back of a telegram undertaking to exempt the telegraph company from liability for its negligence in transmitting a message, though an unrepeatd one, was invalid, and that the company is responsible for losses occasioned by its negligence in transmission. See also, *Western Union Telegraph Co. v. Goodbar*, 7 So. 214. We think these cases and the Dickerson Case rule this case, and decline to overrule the Dickerson Case.

It follows that the judgment should be reversed, and judgment here entered for one hundred twenty-five dollars and twenty-eight cents, which is accordingly done.

*Reversed, and judgment here.*

STEVENS, J. (specially concurring). I concur in the judgment to be rendered in this case, but solely for the reason that *Dickerson v. Western Union Telegraph Co.*, 114 Miss. 115, 74 So. 779, unless overruled, controls the present case. I dissented from the opinion of the court in the Dickerson Case, and I still adhere to the views which I entertained at the time the Dickerson opinion was rendered. In fact, the splendid argument and the authorities collated in the brief of learned counsel for appellee only confirm my personal opinion on the legal questions involved in this as well as in the Dickerson Case.

---

PATE ET AL. v. BANK OF NEWTON ET AL.

[77 South. 601, Division B.]

1. BANKS AND BANKING. *Stockholders. Double liability. Time to sue.*  
Under Laws 1914, chapter 124, section 59, imposing a double liability upon the stockholders of a bank, the obligation of such

stockholders is a primary and not a secondary liability and a suit against them may be maintained whenever it is reasonably apparent that the assets of the bank will not pay the depositors and there is no requirement to await a collection and application of the debts and property of the bank before bringing such suit against the stockholders.

2. **BANKS AND BANKING.** *Increasing liabilities of stockholders. Constitutionality.*

Where a bank was chartered under the general laws of the state at a time when the Constitution expressly provided that all such charters could be repealed or amended by the legislature whenever in the judgment of the legislature it was for the public interest to do so, provided no injustice be done to the stockholders, no injustice was done such bank by Laws 1914, chapter 124, section 59, which while increasing the liability of a stockholder of the bank to the extent of the par value of his stock, at the same time guaranteed payment of depositors by the state.

3. **SAME.**

The legislature may impose reasonable conditions upon the rights of either individuals or corporations as to their future contracts.

4. **BANKS AND BANKING.** *Increasing liability of stockholders. Statute. Application.*

The liability of the stockholder of a bank, as to deposits, accrues with the making of the deposit, and not of the date of granting a charter to do business, while Laws 1914, chapter 124, section 59, increasing the liability of stockholders of banks, imposes liability upon the stockholders of banks incorporated before as well as after its passage, it applies only as to deposits actually made after its passage.

5. **CONSTITUTIONAL LAW.** *Injury obligation of contracts. Increasing liability of stockholders of banks.*

The legislature has the power to change the liability of stockholders with reference to future contracts, even against charter stipulations, where the power to amend or repeal was reserved when the charter was issued.

6. **CONSTITUTIONAL LAW.** *Right to raise question. Acceptance of statute. Banks and banking.*

Where the stockholders of a bank expressly authorized its directors to accept the depositor's guaranty act (Laws 1914, chapter 124, section 59) and held out this inducement to depositors to secure deposits, they are in a poor position to claim exemption from the effect of what they voluntarily did.



## 7. SAME.

Section 59, chapter 124, Laws 1914, imposes liability upon the stockholders of banks whether incorporated before or after the banking act was passed, but this liability does not extend to deposits which were actually made before the passage of the act. As to deposits made prior to the passage of the act, the stockholder's liability will be measured by the law in force at the time of the making of the deposits which constitutes the contract between the bank and the depositor.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Suit by the Bank of Newton and others against W. T. Pate and others. From an order overruling a demurrer to the bill of complaint, defendants appeal.

The facts are fully stated in the opinion of the court.

*Robt. Powell*, for appellant.

While insisting upon all of the grounds assigned under the demurrer, as associate counsel will discuss the other grounds, we shall confine ourselves in this brief to but one of the causes of demurrer, to-wit: That this cause was prematurely brought.

The court will see from the reading of the bill that the amount guaranteed under the law has not yet been ascertained since the bill alleges that suits are now pending to determine this amount.

The court will further see from a reading of the bill that the assets of the defunct bank have not yet been administered and that it will be impossible to ascertain the exact amount of the solvent assets unless this is done. It is true that the bill makes an estimate of what will probably be realized but that is simply a guess on the part of the appellee.

So we start out with the proposition that neither the guaranteed debts are yet known nor are the solvent assets of the bank yet ascertained. Section 59, Laws 1914, under which this suit is brought is as follows: Section 59, Liability of Stockholders. The stockholders of

every bank shall be individually liable, actually and ratably and not for one another, for the benefit of the depositors in said bank to the amount of their stock at the par value thereof in addition to the said stock, etc.

The court will see readily from an inspection of this law that the stockholders were only guarantors and secondarily liable for the debts of the defunct bank. The act says that the stockholders should be ratably liable, which can only mean that they should be compelled to contribute in proportion as the amount of their stock bears to the debt remaining after the assets of the bank have been exhausted. Is it not a self-evident proposition then, that the ratable portion of a stockholder cannot be ascertained unless the amount of the debts are known and the assets with which to pay them has been ascertained; unless this is done, any suit brought against the stockholders under this act is prematurely brought.

*Sidney L. McLaurin*, for appellants.

The charter of the Bank of Newton was a contract between the state of Mississippi and the incorporators. *Stone v. M. V. R. R. Co.*, 62 Miss. 607; *Forsdick v. Miss. Levee Com.*, 76 Miss. 859; *Miss. R. R. Com. v. G. & S. I. R. R. Co.*, 78 Miss. 750; *Baldwin, et al. v. Payne et al.* 12 Law Ed. 447; *Planters Bank v. Sharp et al.*, 12 Law Ed. 447; *Dartmouth College Case*, 4 Wheat. 518; *Piqua Branch of State Bank of Ohio v. Knoop*, 16 How. 369; *Dodge v. Woolsey*, 59 U. S. 331.

It was also a contract between the shareholders themselves. Also a contract defining the rights of depositors. *Baldwin v. Payne* (U. S.), 12 Law Ed. 447.

The law in force as to non-liability of stockholders at the time the charter was granted, necessarily became a part of the contract in the same manner and to the same

extent as if written in the charter. *Assurance Co. v. Phelps*, 77 Miss. 625; *Sherman v. Smith*, U. S. Law Ed. 163.

A charter under the general statute gives exactly the same rights, powers, privileges, whether articles of incorporation expressly embodied the statute or not. See *Sherman v. Smith* (U. S.), *supra*.

Legislative Question. All authorities cited by appellee in support of the proposition that the question of whether or not an injustice is done to stockholders is a legislative question, are decisions of state court. We cite in reply, *Baldwin v. Payne*, 12 Law Ed. 447; *Planters Bank v. Sharp*, 12 Law Ed. 447; *Piqua Branch State Bank of Ohio v. Knoop*, 16 How. 369; *Dodge v. Woolsey*, 59 U. S. (How.) 331.

The last-named case treats the subject so exhaustively that a careful analysis of it will render consideration of the other unnecessary.

Injustice to Stockholders. The legislature, by express terms of the constitution, was prohibited from doing an injustice to stockholders. It might be said that an act of the legislature, making stockholders liable for the debts of a solvent corporation, would not be an injustice to the stockholders. However, an act of the legislature amending a charter so as to make the stockholders individually liable for the debts of an insolvent corporation, would certainly be an injustice to the stockholders. That the liability would apply only to the future debts of the corporation does not alter the situation. The directors and officers would have the right to continue the operation of the bank over the protests of any individual stockholder.

Therefore, the bank officers would have the right to accept new depositors. Thus, the stockholder, without his consent, would have to take money out of his pocket to pay the bank's debts to new depositors.

The case of *Sherman v. Smith*, 17 Law Ed. 447, decided by the United States supreme court, cited by appellee, construed the New York statute wherein the unlimited right of amendment was reserved to the legislature. In that case when the articles of incorporation were made, it was a part of the contract that the legislature should be the sole judge as to making amendment, and any amendment made by the legislature was to become a part of the contract, not only between the state and the incorporators, but also between the corporators themselves.

In the instant case the legislative power is limited by the constitution so that all amendments must be without injustice to the stockholder. What is injustice, is to be determined in each case in its final analysis by the United States supreme court. *Dodge v. Woolsey*, *supra*.

Appellee (brief, page 17) contends that no injustice can be done unless the law confiscates the property of the corporation; in other words, the statute may take the stockholder's money, and that will not be an injustice. The true view is that the corporation property cannot be confiscated, because it would be confiscation of the stockholder's property.

Estoppel. Appellee contends that even though the section as to individual liability he held to be unconstitutional, the stockholders are estopped from denying liability on two grounds: 1. That the bank continued business after the banking act was passed; 2. That the appellants (stockholders) took advantage of the guaranty provision of the act by affirmative action.

To the first proposition we say that the officers of the bank had the right, even over the protest of the stockholders to continue to receive deposits, and such action on the part of the officers could not estop the stockholders from defending against an unconstitutional statute.

The officers and directors were agents of the stockholders to transact the ordinary business of the bank, but were not agents with authority to bind the stockholders under an unconstitutional statute.

To the second proposition, we say: 1. That corporations are created with equality of stockholders as to profits and liabilities and all must stand on the same footing, and therefore, anything that binds one must bind all, and as all the stockholders did not participate, none are thereby made liable. 2. The bank act (section 68) expressly provides that if any section, part or provision of the act be unconstitutional, the balance of the act shall nevertheless remain effective.

Therefore, the fact that section 59 was unconstitutional and did not render the stockholders liable did not prevent the bank from continuing business and entering the guaranty system.

Suit Premature. The authorities cited by appellee to show that suit can be brought before assets of corporation are exhausted, are cases under peculiar statutes. The great weight of authority is that the assets of a corporation must be exhausted. American & English Encyclopedia of Law (1 Ed.), book 23, page 885, and notes on page 886.

The statute now under consideration does not confer right on the stockholders to sue under any circumstances. The liability is not "to" the depositor, but "for his benefit."

The suit is to be brought by the bank or its receiver, and is in the nature of an assessment to make up the deficiency after the assets of the bank are exhausted.

Charter Provisions. Referring back to page 7 of appellee's brief, we call attention to the fact that the case of *Payne v. Baldwin*, 3 S. & M. 661, cited was appealed to the United States supreme court and reversed. *Baldwin v. Payne*, 12 Law Ed. 447; *Planters Bank v. Sharp*, 12 Law Ed. 447.

*Watkins & Watkins*, for appellees.

Section 59, chapter 124, of the Laws of 1914, became effective March 9, 1914, and is valid and enforceable as to banks in existence at the time of its passage, whether the liability was created before or after the passage of the act.

(A) The state did not contract that the liability of stockholders would not be changed. At the threshold of this argument, we desire to direct the attention of this court to the fact that the liability created by section 59, of the act did not depend upon the bank's becoming a guaranteed bank.

This section became effective March 9, 1914. In other words, from and after March 9, 1914, the stockholders of banks became and were liable to depositors. As to whether any bank became a guaranteed bank was optional up to and including May 15, 1915. See section 45.

(1) Section 59 needs no construction. It says the stockholders of every bank admitted into the guaranty system. The language is plain and unambiguous. (2) It is contended by appellants that section 59 of the Act is unconstitutional, in that it deprives the appellant of property without due process of law. As we understand and appreciate their position, it is that at the creation of the appellee bank in 1899 no such liability existed, and that the legislature could not, as to an existing bank already chartered, change the liability of its stockholders. In other words, it is their contention that the state contracted with the stockholders of the appellee bank that they would not be subject to any such liability as is imposed in section 59 of the act in question. The fallacy of this position may be exposed by two observations: (1) there is no such contract in the charter of the appellee bank; (2) appellants had no vested right in the statutory law in force at the time the charter was granted. *Payne, Green & Wood, v. Baldwin*, 3 S. M. 661.

(1) The other observation is not only as obvious but equally as forcible. It is the contention of appellants that in 1899, when the bank was created, the Code of 1892, fixed the liability of the stockholders. In other words, section 909 of the Code of 1906, and section 4081 of Hemingway's Code was in force, fixing the liability of stockholders at the unpaid subscription of stock; and, as we understand appellant's contention, it is that this statute entered into the charter, and the appellants have vested rights therein, which could not be changed or altered. The fallacy of this position however, is fully exposed in the case of *B. & L. Ass'n v. McElveen*, 56 So. 187, 100 Miss. 16. (2) The question presented as to the right of the legislature of the state of Mississippi to change and alter the liability of stockholders in a bank is a legislative and not a judicial one.

Section 178 of the constitution of Mississippi contains the following statement: "Corporations shall be formed under general laws only. The legislature shall have power to alter, amend, or repeal any charter of incorporation now existing and revokable, and any that may hereafter be created, when in its opinion, it may be for the public interest to do so. Provided, however, that no injustice shall be done to the stockholders.

Counsel for appellant in the case conceded the right of the legislature of the State of Mississippi to repeal or amend charters of corporations granted subsequent to the constitution of 1890, which of course includes the charter of the appellee bank in this case. It is their contention, however, that as we understand it, that section 59 does an injustice to the stockholders. The reply to this contention is obvious and two-fold. (1) The question presented is a legislative and not a judicial question. (2) It is not an injustice for the legislature to regulate the liability of stockholders in a corporation to the creditors thereof; provided, of

course, there is no confiscation of the structure of the corporate property itself.

(1) Legislative question. The direct question was presented in the case of *Davis Bank, Comm'r v. Moore*, 197 S. W. 295; *Railway Co. v. Gill*, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452; *Leep v. Railway Co.*, 59 Ark. 407, 25 S. W. 75, 23 Ark. 264, 41 Am. St. Rep. 109; *Railway Co. v. Paul*, 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 62 Am. St. Rep. 154; *Woodson v. State*, 69 Ark. 521, 65 S. W. 465; *Ozan Lumber Co. v. Biddie*, 87 Ark. 587, 113 S. W. 796; *Ark. Stave Co. v. State*, 94 Ark. 27, 125 S. W. 1001, 27 L. R. A. (N. S.) 255, 140 Am. St. Rep. 103, 6 R. C. L., subject, Constitutional Law, Par. 111.

(2) No Injustice to Stockholders. We go further, however, and respectfully submit that by the passage of such a law, no injustice is done to stockholders. Corporations are the creatures of statute. The right of an individual to make contracts is a natural and inherent right, but a corporation is not a person; it is an artificial person; it derives its right to contract solely from legislative enactment. When the stockholders of the corporation received their charter, organized the bank and received certificates of stock, the liability to depositors rested upon certain legislative enactments but they took these shares with full knowledge that the legislature of the state of Mississippi had reserved the right to modify, alter, or amend this liability as the occasion might require. It is not an injustice to stockholders in a corporation merely to regulate their liability to the creditors of the corporation. If they were not satisfied with the additional liability imposed they were not obliged to continue to operate the corporation; they could stop and liquidate its affairs and terminate such liability as may have been incurred, but it does not lie in the mouth of stockholders of a corporation which is the creature of the legislature after the passage of an act in-



Brief for appellees.

[116 Miss.]

creasing the liability to creditors, to continue to operate it under the changed legislative enactment, and then say that the legislature had no right to pass the act. A conclusive reply to the proposition is that if the stockholders were dissatisfied with the changed legislative liability, it was their duty to stop and wind the corporation up, and not continue the incurring of liability. We wish now to direct the attention of the court to some of the adjudications in respect to the subject-matter. *B. & L. Assn. v. McElveen*, 100 Miss. 16; *Banking Comm'r v. Bank*, 73 Miss. 96; *State v. Cotton Oil Co.*, 95 Miss. 6; *Berea College v. Kentucky*, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed.; *Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446, 451 6 Am. Rep. 247; *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500, 522, 21 L. Ed. 133, 140; *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 27 L. Ed. 408, 412, 2 Sup. Ct. Rep. 267, 274; *N. O., J. & G. M. R. R. Co. v. Harris*, 27 Miss. 517. Appellants not in position to question constitutionality of the act.

Under the Banking Act of 1914, the stockholders of the Bank of Newton were not required to become part of the guaranty system until the 15th day of May, 1915. See section 45 (a). Though any bank possessing the necessary qualifications, upon compliance with the provisions of the act, it might become a guaranteed bank and receive a certificate prior to such time. It will therefore be seen that there were two ways by which a state bank could become a member of the guaranty system; (a) voluntarily by complying with the conditions found in the act; (b) involuntarily by continuing to operate the bank until May 15, 1915. 6 R. C. L., subject, "Constitutional Law," par. 95; *Daniels v. Tearney*, 102 U. S. 416, 26 Law. Ed. 187; *Ferguson v. Landrum*, 5 Bush. 230; See *Same v. Same*, 1 Bush. 548; *Vanhook v. Whitlock*, 26 Wend. 43; *Lee v. Tillotson*, 24 Wend. 337; *People v. Murray*, 5 Hill. 468; *Burlington v. Gilbert*, 31 Iowa, 356; *R. R. Co. v. Stewart*, 39 Iowa, 267; *Eust-*

*ance v. Bolls*, 150 U. S. 316, 37 Law Ed. 1111; *Fidelity & Deposit Co. v. Wilkinson County*, 109 Miss. 879, 3 R. C. L., subject, Banks, par. 26; 10 Cyc., page 669; *Sherman v. Smith*, 17 Law Ed. 163.

In the case of *McGowan v. McDonald* (Cal.), 52, A. S. R. on page 149, it was held that under a constitutional provision providing that all general and special laws for the formation of corporations may be altered or repealed, that the legislature had the power to change the law relating to the liability of stockholders, without impairing the obligation of contracts, although in so doing, obligations were imposed upon such stockholders for which they were not liable when they became such. *Reciprocity Bank*, 22 N. Y. 9; *Sleeper v. Goodwin*, 67 Wis. 577; *Tomlinson v. Jessup*, 15 Wall. 454; *Meadow Dam Co. v. Gray*, 30 Me. 551; *Gardner v. Insurance Company* (R. I.), 11 Am. Rep. 238; *Oliver Lee & Company's Bank*, 21 N. Y. 9; *Reciprocity Bank*, 22 N. Y. 9; *Barnes v. Arnold*, 51 N. Y. S. 1109; *Hagmayer v. Alten*, 72 N. Y. S. 623; *Arenz v. Ware*, 83 Ill. 25; *Weidenger v. Spruance*, 101 Ill. 278; *Sleeper v. Goodwin* (Wis.) 31 N. W. 335; *R. R. Co. v. Suprs. of Trempealeau County*, 35 Wis. 257; *Attorney General v. R. R. Co.*, Id, 425-575; *Smathers v. Bank* (N. C.), 47 S. E. 893; *Whitman v. Bank*, 44 Law Ed. 587; *Williams v. Nail*, 55 S. W. 706; 4 Thompson on Corporations, page 1211; *Shufeldt v. Tolliver*, 8 Ill. App. 545; *Stanley v. Stanley*, 26 Maine 191; *Langley v. Little*, 26 Maine, 162; *Coffin v. Rich*, 45 Maine 507, Am. Dec. 509-510.

There is a suggestion in brief of counsel for appellants that the statute in question should be held to be unconstitutional, not because the deposit liabilities involved in this case were created prior to the passage of the act but because the act, on its face, would, as counsel claim, permit such recovery. The authorities which we have cited seem to maintain the doctrine that it is immaterial when the liability was created, whether be-

fore or after the passage of the act. We do not concede that the act would be unconstitutional if held applicable to deposit liabilities created prior to its passage, but we say in respect thereto that appellants are in no position to raise the question because they are not in that class. The deposit liabilities sought to be enforced against them were all created after the passage of the act, and after they voluntarily became a part of the guaranty system. In other words, the appellants are not within the class mentioned, to which we cite the following authorities which are conclusive.

This doctrine is illustrated in the case of *R. R. Co. v. Crawford*, 55 So. 596, 99 Miss. 697; *Grenada Lumber Co. v. State of Mass.*, 48 So. 1021; *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 174; *Y. & M. V. R. R. Co. v. Jackson Vinegar Co.*, 57 L. Ed. 193; *R. R. Co. v. Brandon*, 98 Miss. 461; *R. R. Co. v. Winn*, from the supreme court of Arkansas; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 41 L. Ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; *Lee v. N. K.*, 207 U. S. 67, 52 Law Ed. 106, 28 Sup. Ct. Rep. 22; *So. R. Co. v. King*, 217 U. S. 524, 54 L. Ed. 868, 30 Sup. Ct. Rep. 594; *Collins v. Tex*, 223 U. S. 288, 56 L. Ed. 439, 32 Sup. Ct. Rep. 286; *Standard Stock Food Co. v. Wright*, 225 U. S. 240, 56 L. Ed. 1197, 32 Sup. Ct. Rep. 784; *Quin v. State of Miss.*, 82 Miss. 76.

No proposition is better settled in the jurisprudence of this country, than that it is unnecessary, prior to filing suit against the stockholders in the bank to exhaust the assets under statutes similar to ours. In the first place an examination of the statute shows no such condition. The statute says that the stockholders shall be individually liable for the benefit of depositors, and provides in whose name the suit shall be brought. The statute does not say that the stockholders shall be liable after the exhaustion of assets, and to adopt the construction contended for by counsel of the appellants would be to write into the statute something that the legislature has not written there.

116 Miss.]

Brief for appellees.

It might be well at this point to direct the attention of the court to the language of Mr. Justice STEVENS, in the case of *Anderson v. Wilbourn*, 74 So. 682; *Davis v. Moore*, 197 S. W. 295; 3 R. C. L. subject, Banks, paragraph 42; 7 C. J., page 14; *Bird v. Calvert*, 22 S. C. 297; *Thomp., Liab. Stock.*, paragraphs 34, 292, 321; *Johnson v. S. W. R. R. Bank*, 3 Strob. Eq. 273; *Terry v. Martin*, 10 S. C. 263; *Sullivan Mfg. Co.*, 14 Id. 494, and 20 S. C. 79; *Bank v. Bivingsville Cotton Mfg. Co.*, 10 Rich. 100; Georgia Case of *Lamar, Executor, et al. v. Taylor et al., Receivers*, 141 Ga. 227, 80 S. 1085; *Davidson v. Rankin*, 34 Cal. 505; *Mokelumne Hall Canal Company v. Woodbury*, 14 Cal. 265; *Morrow v. Superior Court*, 64 Cal. 383; *Mokelumne Hall, etc., v. Woodbury*, 110 Cal. 265; *Prince v. Lynch*, 38 Cal. 528; *Sonoma Valley Bank v. Hill*, 59 Cal. 107; *Young v. Rosenbaum*, 39 Cal. 654; *Paine v. Stewart*, 33 Conn. 530; *Gibbs v. Davis*, 8 So. 633; *Lamar, Executor, et al. v. Taylor et al., Receivers*, 141 Ga. 227., 80 S. E. 1085; *Fuller v. Ledden*, 87 Ill. 310; *Culver v. Third National Bank*, 64 Ill. 530; *Corning v. McCulloch*, 1 Comstack, 47; *Allen v. Sewell*, 2 Wend. 327; *Aspinwall v. Succhi*, 57 N. Y. 331; *Heager v. McCullouch*, 2 Denio. 123, and *Coleman v. White*, 14 Wis. 701; *Parmelee v. Prince*, 208 Ill. 544; *Low v. Buchanan*, 94 Ill. 76; *Moore v. U. S., etc., Co.*, 87 N. E. 536, 239 Ill. 544; *Calder v. Calder Co.*, 160 Ill. App. 620; *Queenan v. Palmer*, 117 Ill. 62; *Schalucky v. Field*, 124 Ill. 617; *State v. Union Stock Yards State Bank*, 103 Iowa, 549., 70 N. W. 752., 72. N. W. 1076; *Sleeper v. Norris*, 59 Kan. 555., 53 Pac. 757; *Harrison v. Remington Paper Co.*, 140 Fed. (Kan.) 385, 72 C. C. A. 405., 3 L. R. A. (N. S.) 954; *Foster v. Row*, 77 Am. St. Rep. 565., 120 Mich. 1, 79 N. W. 696; 6 Detroit Leg. N. 229; *Perkins v. Sanders*, 59 Miss. 741; *Selma and Marion Railroad Company v. Anderson*, 51 Miss. 829; *Flynn v. American Banking & Trust Co., et al.*, 104 Me. 141, 69 Am. So. Rep. 771, 129 Am. St. Rep. 378; 19 L. R. A. (N. S.) 428; *American Spirits Mfg. Co. v. Elridge*, 209 Mass. 590., 95 N. E. 942, *Marcy v. Clark*, 17 Mass. 330;

*Patterson v. Stewart*, 41 Minn. 94, 42 N. W. 926., 16 Am. St. Rep. 671; *Paterson, v. Minn. Mfg. Co., et al.*, 4 L. R. A. 745; *State Sav. Ass'n v. Kellogg*, 63 Mo. 540; *Bittner v. Lee*, 25 Mo. App. 559; *Schneider v. Johnson*, 147 S. W. 539; *Smathers v. Bank*, 135 N. C. 410, 47 S. E. (1904) 893; *Man v. Boyken*, 79 S. Car; *Brinkworth, et al., v. Hazelett, Receiver*, 64 Neb. 492, 90 N. W. 537; *Covell v. Fowler*, 144 Fed. 535; *Davidson v. Gretna State Bank*, 59 Neb. 63; *Van Tuyl v. Sullivan*, 156 N. Y. S. 310; *Mahorney v. Berghardt*, 63 N. Y. S. 642, affirmed 169 N. Y. 589, 62 N. E. 1097; *Walton v. Coe*, 110 N. Y. 109, 17 N. E. 676; *Corning v. McCollough*, 1 N. Y. 47; *Ford v. Chase*, 103 N. Y. S. 30; *Moss v. Averell*, 10 N. 449; *Shipman, etc., Co. v. Portland Const. Co.*, 128 Pac. 980; *Garretson Lbr. Co. v. Hinson*, 69 Ore. 605; 140 Pac. 633; *Craig's Appeal*, 92 Pa. St. 396; *Aultman's Appeal*, 98 Pa. St. 505; *Bank of Desoto v. Reed*, 109 S. W. (Tex.) 260; *Jackson v. Meek*, 87 Tenn. 96., 9 S. W. 225; 10 Am. St. Rep. 620; *McLaughlin et al. v. O'Neil*, 51 Pac. 243, 7 Wyo. 187; *Booth v. Dear*, 71 N. W. 816, 96 Wis. 516; *Coleman v. White*, 14 Wis. 700; *Cleveland v. Marine Bank*, 17 Wis. 545; *Merchants Bank v. Chandler*, 19 Wis. 434; *Terry v. Chandler*, 23 Wis. 456.

We respectfully submit that the decree of the chancellor should be affirmed.

ETHRIDGE, J., delivered the opinion of the court.

The Bank of Newton was incorporated under the laws of the state of Mississippi in 1898, with a capital stock of fifty thousand dollars. In 1910 it procured a charter amendment under the laws of the state, increasing its capital stock to seventy-five thousand dollars. In 1914 the state of Mississippi passed an act regulating and guaranteeing the deposits of the banks to depositors whose claims were secured, and in the said act (chapter 124, Laws of 1914) it was provided in section 59 that the stockholders of banks shall be liable, in addition to their stock, to the amount of the par value of the stock held by such

stockholder. After the passage of this act the Bank of Newton was examined by one of the bank examiners provided for in said law, who reported the bank to be solvent and in good condition. Thereupon the stockholders of the bank passed a resolution authorizing and directing the directors to take the necessary steps to come under the guaranty features of the Banking Act referred to. The provisions were complied with, and in January, 1915, the said bank became a guaranteed bank, with the approval of the bank examiners, and continued to do business until February, 1916, when one of the bank examiners found the bank to be insolvent, and proceeded to liquidate the bank according to the provisions of the act.

The bill of complaint set out the names of the stockholders of the bank and the amounts of stock held by each, and also set out the resolutions of the directors and stockholders adopting and electing to come under the Banking Act referred to. It is alleged that the assets of the bank would not pay the depositors, and that, after applying all the assets, there would be left a balance due the depositors in excess of the amount of capital stock. It is alleged that all the deposits were contracted subsequent to the passage of the Banking Act and subsequent to the resolution of the stockholders to become a guaranteed bank and to take the benefits of the Banking Act. It was also alleged in the bill that the bank was liquidated under the direction of the chancery court of Newton county, and that the chancellor of that district had directed the bringing of the suits against the stockholders, under section 59 of the act. Also, the bill alleged that, while the bank was examined by the bank examiner and reported by him to be in good condition, in fact the assets of the bank were not equal to its liabilities when the Banking Act was passed, and also when the bank became a guaranteed bank under the provisions of the resolution of the stockholders and the statute applicable in such cases. It appears from the allegations of the bill that all the assets of the bank

had not been exhausted, but it was alleged that the assets left would not pay the depositors, and there would be a difference, after exhausting the assets at a fair value, of more than the capital stock of the bank due the depositors. After the bank examiner took charge of the bank under the provisions of the act, it is alleged, the directors appointed a representative upon whom process might be served, and also granted authority to the liquidator of the bank to sell the real estate and other property in the administration and liquidation of the bank. It appears in the allegations of the bill that some of the stockholders had recognized their liability and had paid to the liquidators of the bank the amount equal to the par value of their stock and had been settled with.

The defendants demurred to the bill of complaint on several grounds, viz: that there was no equity on the face of the bill; that the bill did not charge that the bank was solvent at the time of the approval of the act of 1914 by the Governor, nor at any time thereafter; that the bill admits that the bank was insolvent at the time of the approval of the act of 1914; that the bank was incorporated under the laws of the state prior to the passage and approval of chapter 124 of the Laws of 1914, and that the bank had not since amended its charter, and that all the capital stock was subscribed for and paid in prior to the passage of said act; that the charter of the bank constituted a contract which could not be impaired without the consent of the stockholders so as to impose personal liability on the stockholders, and that to do so would be to do an injustice to the stockholders, because of section 178 of the Mississippi Constitution of 1890, providing that charters of private corporations may be repealed or amended, "provided that no injustice be done to the stockholders;" that the bill shows that the assets had not been exhausted, and that suit for the personal liability of the stockholders could not be brought until the assets had been first exhausted. The chancellor overruled the de-

murrer and granted an appeal to settle the principles of the case.

This demurrer presents two questions for decision: First, was the suit prematurely brought? and, second, can the liability imposed by section 59 of the Banking Act be imposed upon stockholders of corporations already incorporated at the time of the passage of the act? Section 59 of chapter 124 of the Laws of 1914 is as follows:

“Liability of Stockholders. The stockholders of every bank shall be individually liable, actually and ratably, and not for one another, for the benefit of the depositors in said bank to the amount of their stock at the par value thereof, in addition to the said stock; but persons holding stock as executors, administrators, guardians, or trustees, and persons holding stock as collateral security, shall not be personally liable as stockholders, but the assets and funds in their hands constituting the trust shall be liable to the same extent as the testator, intestate, ward or person interested in such trust fund would be, if living or competent to act; and the person pledging such stock shall be deemed the stockholder and liable under this section. Such liability may be enforced in a suit at law or in equity by any such bank in process of liquidation, or by any receiver, or other officer succeeding to the legal rights of said bank.”

The first question presented for decision turns upon the further question of whether this liability is a primary or secondary one. A careful reading of the whole act convinces us that it is a primary liability.

The purpose of the act, that is to say, its leading and controlling purpose, is to make the claims of depositors safe, and to provide for their payment as promptly as is consistent with justice to the bank and to its stockholders. The concluding sentence of section 59, providing for the enforcement of this liability says:

“Such liability may be enforced in a suit at law or in equity by any such bank in process of liquidation, or by



any receiver, or other officer succeeding to the legal rights of said bank."

This is the only provision we have noted that provides the time of the bringing of the suit, and that is, while the bank is in process of liquidation. There is no requirement to await a collection and application of the debts and property of the bank before bringing this suit against the stockholders. In many cases it would require a considerable period of time to collect the debts and dispose of all the personal and real estate belonging to a bank, even though it might be perfectly manifest that when this is done there would still be a large deficit due to the depositors. If the bank or its liquidators were required to await until the debts had been collected and the assets converted into cash, many of the stockholders might escape liability by becoming insolvent or moving out of the jurisdiction of the court. When the stockholders pay this liability into the bank and it is applied to the satisfaction of the depositors' claims, and after the debts of the bank are paid, if there were any funds left the stockholder would naturally secure this remainder as a stockholder of the bank; and, of course, a stockholder who had paid the liability would first be repaid before any stockholder who had not paid such liability would be entitled to any dividend from the proceeds of the bank. We therefore think that the suit can be maintained whenever it is reasonably apparent that the assets of the bank will not pay the depositors.

As to the second proposition: The bank was chartered under the general laws of the state at a time when the Constitution expressly provided that all such charters could be repealed or amended by the legislature whenever in the judgment of the legislature it was for the public interest to do so, provided no injustice be done to the stockholders. It is not necessary in this suit to define what might or might not constitute an injustice to the stockholders, nor, whether this provision of the Constitu-

tion presents a legislative or a judicial question. It certainly could not be said that an injustice was done to the stockholders under an amendment whereby the corporation, after such amendment, could do business under more favorable terms than a person or a partnership could do. Under the present banking law, even with a stockholder's liability equal to the par value of the stock, the stockholders of a corporation have the advantage of an individual doing such business. An individual, or a partnership, doing a banking business would be under a liability, not only equal to the capital of the bank, but an unlimited liability upon each person in the partnership doing such business, which liability could be kept alive and in force all the time during the life of such person and against his estate in case of death. It is well settled by the authorities that the legislature may impose reasonable conditions upon the rights of either individuals or corporations as to their future contracts.

We think the liability of the stockholder, as to a deposit, accrues with the making of the deposit, and not of the date of granting a charter to do business. At the time the charter of the Bank of Newton was granted, the general law provided that the liability of a stockholder extended only to the amount of his stock, except where otherwise provided by statute. Sections, 909, 922, 924, Code of 1906, sections 4081, 4096, 4097, and 4098, respectively, Hemingway's Code. A different question would be presented if a deposit made prior to the passage of the banking law was sought to be imposed as a liability upon the stockholder in excess of his stock. In the case of *Bank of Oxford v. Love*, 111 Miss. 699, 72 So. 133, the general features of the Banking Act were upheld by this court.

The United States Supreme Court has specifically upheld the power of a legislature, in cases of this kind, to change the liability of stockholders with reference to future contracts, even against charter stipulations, where the power to amend or repeal was reserved.

*Sherman v. Smith*, 1 Black, 589, 17 L. Ed. 173. In that case the articles in the charter of the New York Banking Association declare:

"The shareholders of this association shall not be liable in their individual capacity on any contract, debt or engagement of the association."

A section of the Banking Act of New York reserved to the legislature the power to alter or repeal the act, and the court held that by necessary construction this provision reserved the power to alter or repeal all or any one of these terms and conditions or rules prescribed by the act. In 3 R. C. L., tit. "Banks," par. 26, p. 397, the following language is used:

"Where the power to alter or amend a charter of a banking corporation is reserved to the legislature, it may change the law in regard to liability of stockholders without violating the provision of the federal Constitution forbidding the impairment of the obligation of contracts. The constitutional provision that the legislature shall grant no charter for banking purposes except upon condition that the stockholders shall be liable for the debts of the bank to the extent of their stock does not preclude the legislature from imposing a greater liability."

See also, 10 Cyc. 699.

There are many decisions of the several states to the same effect, all holding that, as to future contracts, the legislature may impose additional liability whenever there is a reservation of power in the charter to alter, repeal, or amend the same. In the present case, however the stockholders of the bank expressly authorized and directed the directors to take the necessary steps to come under and secure the benefits of the banking act. This was one, and the bank examiners gave the bank a certificate of guaranty, certifying that the depositors' deposits would be guaranteed by the state under the Banking Act. All this was done by the stockholders

and directors before the time provided in the act in which it would be necessary for a bank to qualify, according to the act, to do a banking business. Under this arrangement, the bill alleges, the bank received all its deposits involved in this suit, and the depositors had a right to assume that their deposits would be guaranteed, not only by the bank and the state banking funds, but also by the security afforded by the stockholders' liability under the terms of the act; and the stockholders, having held out this inducement, in order to secure the deposits, are in a poor position to now claim exemption from the effect of what they voluntarily did. •

We are of opinion that section 59 imposes the liability upon the stockholders of banks whether incorporated before or after the Banking Act was passed, but that this liability does not extend to deposits which were actually made before the passage of the act. As to deposits made prior to the passage of the act, the stockholders' liability will be measured by the law in force at the time of the making of the deposits which constitutes the contract between the bank and the depositor.

The judgment of the chancellor is affirmed, and the cause is remanded.

*Affirmed and remanded.*

---

PRICE ET AL. v. SIMS ET AL.

[77 South. 649, Division A.]

1. SCHOOLS AND SCHOOL DISTRICTS. *Consolidated districts. Elections. Bonds. Withdrawing names. Rights of signers.*

Signers to a petition addressed to a board of supervisors or a municipality can take their names therefrom by signing a counter-petition.

Brief for appellant.

[116 Miss.]

2. SCHOOLS AND SCHOOL DISTRICTS. *Consolidation. Bond issues.*

Under chapter 197, Acts 1914, sections one and two amending Acts 1912, chapter 159 (Hemmingway's Code, section 7357), making it the duty of the board of supervisors to issue bonds for building and repairing schools in consolidated school districts on petition of a majority of the tax-payers, and providing that such bonds shall be issued as provided in the chapter on municipalities, refers only to section 3416, Code 1906 (Hemmingway's Code, section 5975), which provides a complete scheme for the issuance of bonds, and not to section 3419, Code 1906 (Hemmingways Code, section 5978), which requires, before the issuance of municipal bonds, that the board shall publish notice of the proposal, so that, when a petition under chapter 197, Acts 1914 (Hemmingway's Code, section 7357), contains a sufficient number of names, it is mandatory upon the board to issue the bonds, and no election need be called or notice given.

APPEAL from the circuit court of Marion county.

HON. A. E. WEATHERSBY, Judge.

Suit by F. V. B. Price and others and H. J. Sims and others. From a judgment of the circuit court affirming a judgment of the board of supervisors denying the petition for an election on the question of issuing bonds for a consolidated school district, Price and others appeal.

The facts are fully stated in the opinion of the court.

*B. S. Sylverstein and G. Wood MaGee*, for appellant.

No notice of the board's proposal to issue the bonds was published for three weeks so far as the record in this case shows. On this state of facts the trial court held that inasmuch as a majority of the taxpayers petitioned for the bonds, no election was necessary.

Was this ruling a correct interpretation of the statutes under review? If so the case will be affirmed and if not the case must be reversed.

Let's notice these statutes for a moment; section 4534, Code 1906, makes provision for the issuance of bonds for school purposes "in the manner provided in the chapter on municipalities." In others words every

requirement of the statute providing for the issuance of bonds by a municipality must be observed in issuing the bonds in question.

Section 3419, Code of 1906, the section referred to in section 4534, prescribes in unmistakable terms the preliminary steps to be taken before issuing bonds. Quoting the section literally, we find it as follows: "Before providing for the issuance of any bonds, the board shall publish notice of the proposal to issue the same in a newspaper published in the municipality, or having a general circulation therein, if one be there published for three weeks next preceding; and if within that time twenty per centum of the adult taxpayers of the municipality shall petition against the issuance of the bonds, then the bonds shall not be issued, unless authorized by a majority of the electors voting in an election to be ordered for that purpose. All the expenses of preparing the bonds, publishing the notices and holding the election shall be paid out of the municipal Treasury."

There can be but one construction placed upon this statute when twenty per centum of the taxpayers petition against the issuance of the bonds, and that is an election upon the question must be ordered. It is equally as mandatory that notice of the proposal to issue the bonds must be published for three weeks as required by the statute, and so far as this record shows no such notice was published at all.

The provisions of this section of the Code prevents snap judgment being taken against any taxpayer, in that a chance is given him to protest if he desires to do so, and gives him a chance to pause, deliberate and act upon the matter advisedly and not hastily and in an ill-advised way. And it is well that such is the case, for many men will readily sign a petition when presented to them and will subsequently, on reflection, withdraw their names therefrom. Such was the case

as shown by this record with the fourteen men who signed the petition for the bonds and afterwards signed the petition asking that the bonds be not issued.

The trial court very properly held that these men had a right to withdraw from one petition and sign the other and that the board of supervisors committed an error in not counting them against the bond issue. See 28 "Cyc," page 1587, and authorities cited.

From an inspection of the record in this case, the lower court evidently took the position that because a majority of the taxpayers signed a petition asking that the bonds be issued, no election was required and no notice need be published:

If notice of the proposal to issue the bonds had been published as the statute requires, there might have been a clear majority of the taxpayers protesting against the bonds, and still an election would have to be ordered unless petitioners for the bonds had withdrawn their petition—in other words, an election is mandatory, for the question as to whether the bonds will be issued must be decided by and at an election and not on mere signatures to a petition.

The questions raised by this record are fully discussed by this court in the case of *Clarksdale v. Broadus*, 77 Miss. 667, and a mere reference to the announcement of the law as made in that case by this court is all-sufficient to reverse the case at bar.

So that it appears clear that the court below was in error in affirming the action of the board of supervisors in ordering the issuance of bonds in this case without first ordering an election, first, because no notice of the proposal to issue the bonds was published as required by the statute, and second, because more than twenty per centum of the voters had asked that the matter be submitted to an election to be ordered for that purpose, and for these reasons, we submit that the judgment of the court below should be reversed.

*Davis & Langston*, for appellees.

One hundred and sixty taxpayers of the Hub Consolidated School District, in accordance with chapter 197 of the Acts of the Mississippi Legislature of 1914, petitioned the Marion county board of supervisors to issue bonds for the purpose of erecting a school building, etc. Forty taxpayers of this district filed a counter-petition. Fourteen of the names appearing on the counter-petition also appeared on the petition asking for the bond issue. The agreed statement of facts show that regardless of where these fourteen names are placed, the petition for the bond issue is signed by a large majority of the resident taxpayers of that district. The petition for the bond issue was drawn under section two of chapter 197 of the Acts of 1914.

Counsel for appellants take the position that the fourteen names referred to above should be counted on the counter-petition, so as to give them twenty per cent. of the resident taxpayers of that district on the counter-petition, and that an election should be ordered so as to ascertain the will of the people of the district as is provided in the chapter on municipalities.

The chapter under which this petition was drawn points out clearly and unmistakably all steps necessary to be taken before the bonds are issued, then it points out the chapter on municipalities as to the manner of issuing these bonds; that is to say, how much interest the bonds shall bear; when they shall mature; how payable; in what amounts they shall be issued; that they shall be lithograph or engraved; shall be printed in two or more colors and show on their face the purpose for which they were issued, etc. See section 3416 of the Code of 1906.

The mayor and board of aldermen may pass a resolution of their own motion to issue bonds; then it is necessary to publish a notice of such intentions; then twenty per cent. of the taxpayers of the municipalities may pe-



tition against the bond issue, when it becomes the duty of such mayor and board of aldermen to call an election to ascertain the will of the people. If counsel's contention is correct, then the Acts of 1914, are inconsistent with the chapter on municipalities. The board of supervisors have ascertained the will of the people by the petition of such people. Then why should they do the same thing over again except in a different way?

Counsel for the appellants have much to say because the record does not show that a notice of the intention to issue bonds was published. In the first place if chapter 197 of the Acts of 1914, is to be taken as it reads, no such notice was necessary, and the cases cited on that point do not apply here. In the second place, if no such notice was published, and same should have been, the burden was on the appellants to put that fact in the record. The court below was not asked to pass on any such issue, the only issue that court was asked to pass upon, and the only issue which that court did pass upon, was the matter and things set out in the agreed statement of facts.

We submit this case with perfect confidence that it will be affirmed.

SYKES, J., delivered the opinion of the court.

This is an appeal from a judgment of the circuit court of Marion county, affirming a judgment of the board of supervisors of that county, which order of the board of supervisors denied a petition signed by forty resident taxpayers, asking that an election be ordered to decide whether or not bonds should be issued by a consolidated school district. An agreed statement of facts is contained in the record. It is shown by the record that one hundred and sixty resident taxpayers of the Hub consolidated school district, containing more than sixteen square miles, petitioned the board of supervisors to issue bonds for said school district for the purpose of erecting

and equipping a school building, the amount of bonds being five thousand, five hundred dollars in denominations of one hundred dollars each, to be known as the "Hub consolidated district bonds;" to be numbered from one to fifty-five inclusive; to bear date of their issuance, and be payable five years from the date of issuance; to bear interest at the rate of six per centum, payable semiannually, with interest payments being evidenced by coupons attached to the bonds; principal and interest being payable in lawful money of the United States. The petition was signed by one hundred and sixty resident taxpayers of the county, and was prepared under chapter 197, Acts of 1914, sections 1 and 2 thereof, which read as follows:

"Section 1. Be it enacted by the legislature of the state of Mississippi, that Senate Bill No. 79, chapter 159, of the acts of the legislature of 1912, be amended so as to read as follows:

"That the board of supervisors of any county be and the same is hereby authorized to issue bonds of the county, a supervisor's district, or a school district containing not less than sixteen (16) square miles, excluding in each case the territory embraced within separate school districts, for the purpose of erecting, repairing and equipping school buildings for the county, a supervisor's district, or a school district as the case may be.

"Sec. 2. Whenever a majority of the resident taxpayers of a county, of a supervisor's district, or of a school district containing not less than sixteen (16) square miles shall petition the board of supervisors to issue bonds for the purposes hereinbefore stated the board of supervisors of such county shall issue bonds of the county, of a supervisor's district or of a school district according to the direction of the petitioners, not to exceed five per centum (5 per cent) of the assessed value of the county, if it be for the county; or of the district if it be for a supervisor's district, or of a school

district if it be for a school district, said bonds to be issued in the manner provided in the chapter on municipalities. When a county, a supervisor's district or school district shall become obligated through the sale of bonds as indicated herein, it shall be the duty of the board of supervisors to levy a tax annually on the taxable property of the county or supervisor's district or school district as the case may be, sufficient to pay the interest on said bonds and to create a sinking fund for their redemption."

These sections are also found in Hemingway's Code, sections 7356, 7357.

A petition asking that the board order an election upon the question of whether or not these bonds should be issued was then filed with the board of supervisors. Fourteen of the signers of this counter-petition had also signed the petition asking for the issuance of the bonds. The agreed statement of facts shows that the forty resident taxpayers who signed the counter-petition constituted more than twenty per centum of the adult resident taxpayers of the district. It is further shown that there were one hundred and ninety-six resident taxpayers in said district. The board of supervisors in their order declining to call an election, held that these fourteen taxpayers who signed the counter-petition, and who had also signed the original petition asking for the issuance of the bonds, had no right, by the signing of the counter-petition, to take their names from the original petition. In this ruling the board committed error. This court has uniformly held that signers to a petition addressed to a board of supervisors or a municipality can take their names therefrom by signing a counter-petition. Subtracting these fourteen names from the one hundred and sixty taxpayers who signed the petition leaves still upon the original petition one hundred and forty-six signers. There being only one hundred and ninety-six resident taxpayers in the school district, this

then left upon the original petition many more than a majority of these taxpayers.

The question for decision, then, is whether or not section 2 of the act above quoted (section 7357, Hemingway's Code) is a complete scheme in itself, providing when these bonds shall be issued by the board, or whether that part of this section, which reads, "Said bonds to be issued in the manner provided in the chapter on municipalities," merely refers to the details of the issuance of the bonds as set forth in section 3416, Code of 1906 (section 5975, Hemingway's Code), or also refers to section 3419, Code of 1906 (section 5978, Hemingway's Code), which provides, in short, that before the issuance of any municipal bonds, "the board shall publish notice of the proposal to issue the same in a newspaper . . . for three weeks next preceding; and if, within that time, twenty per centum of the adult taxpayers of the municipality shall petition against the issuance of the bonds, then the bonds shall not be issued, unless authorized by a majority of the electors voting in an election to be ordered for that purpose." The issuance of these bonds by a municipality, referred to in section 3419, a part of which is above quoted, is dealing with the question where the mayor and board of aldermen of the municipality, on their own initiative, without any petition of the taxpayers to do so, issue these bonds. The taxpayers are not consulted in the first instance, nor have they any voice in passing upon the desirability of the issuance of the bonds. They are given the right to protest against the issuance, and if twenty per cent. so protest, then an election will be called. This scheme is quite different from the one under consideration. Chapter 197, Laws of 1914 (section 7356 et seq., Hemingway's Code), provides a complete scheme for the issuance of the bonds, save that the details of the same are governed by section 3416, Code of 1906 (section 5975, Hemingway's Code). The only manner provided in the act under discussion for the issuance

of these bonds is upon the petition of a majority of the taxpayers. The resident taxpayers, by their petition, are given the right to say whether or not these bonds shall be issued, and when a majority of them so signify by the petition, and do not take their names from the petition by a counter-petition, then, under this act, it is mandatory upon the board of supervisors to issue the bonds. No notice by publication is required under this act before the issuance of the bonds; in fact there is no reason for any publication, because the resident taxpayers of the district have already expressed by petition their desire to have these bonds issued and the amount for which they are to be issued. The reason for the publication of the issuance of the bonds under section 3416 of the Code (sec. 5975, Hemingway's Code) is to give the taxpayers the right to protest, if they so desire, they having had no voice in the first instance as to the desirability of the issuance of these bonds. This chapter 197, Acts of 1914 (section 7356 et seq., Hemingway's Code), is an amendment to chapter 159, Acts of 1912. The material difference between the act of 1912 and the one under consideration is that in the act of 1912 it was left to the discretion of the board to issue these bonds after the petition of the majority of the resident taxpayers. The act of 1914, however, takes away the discretion of the board of supervisors, and now makes it mandatory upon the board to issue these bonds upon the petition of the requisite number of resident taxpayers. The lower court correctly held that the board of supervisors was in error in failing to take the fourteen names of the signers of the second petition, who also signed the first petition, from the first petition; and was also correct in holding that the said petition still contained a majority of the resident taxpayers of the school district, but that the order of the board was proper in denying the counter petition and failing to call an election. It follows that the judgment of the circuit court is affirmed.

*Affirmed.*

## STATE v. HAMILTON.

[77 South. 650, Division A.]

1. COLLEGES AND UNIVERSITIES. *Power to lease lands. Laws 1860, chapter 118, Section 1.*

The power granted to the trustees by chapter 118, Laws 1860, and again by section 745, Code 1880, to lease the lands of the University of Mississippi, is a continuing one, and therefore is not exhausted as to each parcel of land by one lease thereof.

2. SAME.

That a first lease had some time to run when a second was made has no bearing upon the power of the trustees to make the second lease.

APPEAL from the chancery court of Lafayette county.

HON. J. G. MCGOWEN, Chancellor.

Suit by the state of Mississippi against Mrs. S. E. Hamilton. From a judgment for defendant, the state appeals.

The facts are fully stated in the opinion of the court.

*S. A. Morrison*, for appellant.

The University of Mississippi is a public corporation, a creature of the legislature, subject to the political or legislative power of the state at all times; an instrumentality of the state, having no vested power saved by and through the state by the legislature thereof. *State v. Vicksburg & Nashville R. R. Company*, 51 Miss. 361; *University v. Waugh*, 105, Miss. 623.

Our legislative history relative to this class of institutions shows that the state of Mississippi has ever held a close grip upon its University and also other state schools. Both the original lease and the second lease for a term of years refer to the Act of 1860, directly or indirectly, and it is upon this law that this case is contested, and the lease itself.

The law of 1860 presents no difficulty in construction; its verbiage is plain; the board of trustees was authorized to make a lease for a term of years; certain conditions and considerations are stated in the law, and the purpose therein is made clear, the only authority given by this Act of 1860 to the board of trustees is to lease for a term of years. The words "lease" and "term of years," have a legal, ordinary, determined, and common-law meaning; a meaning, a definition known to all, and the use of the words, is in accord with the application of the same by the board in the original lease under which the lessee took and bound herself to deliver the property, the dwelling and outhouses in good state of repair at the end of the term of years.

Did the legislature of 1860 intend by this act to authorize the board of trustees to grant a second term of years? There is neither word nor sentence implied or expressed from which such meaning may be drawn. The court will look to the whole act for the construction thereof; when the whole is examined, it appears, even stronger than part thereof quoted, to mean the opposite to a power in such board to lease for a second term of years.

But suppose the board of trustees of the University had leased for a term of years without day of beginning and termination. What would have been the result? The lessee must begin on his lease contract in a reasonable time and while I do not believe our court would so hold in this case, yet the longest possible time that would pass would be for life of the tenant. *Harley v. O'Donnell*, 9 Pa. Co. Ct. R. Cm., pages 56-7; an estate of greater dignity by fiction but not as valuable as the term of years given in this instance, originally.

The legislature, from another viewpoint, may have intrusted the date of termination or the number of years of the term to the board on the theory that the local conditions and the considerations, the board was to

secure the other contracting party, but it cannot be that the long term of ninety-nine years was intended.

The court will construe and not construct a statute of the legislature. The state alone has the right to look forward to the termination of the original term of years authorized by the Act of 1860 to decide what will be its policy for the future. *Smith v. Cornelius*, 20 L. R. A. 747; *De Soto County v. Weatherford*, 75, So. 114; *Little v. The Board of Regents of Kansas*, 29 L. R. A. 378.

The laws relative to the University are collected in the Code of 1857, chapter eleven; again such laws are collected and brought into the Code of 1871, chapter 40; thus just before the Act of 1860 and prior to the action of the board of trustees in putting into effect the Act of 1860, see the power brought together; the Act of 1860 does not appear in any Code. But several acts have been passed by the legislature touching in certain ways the act of 1860.

This lease was made in 1872, we find the first act of the legislature in regard thereto, that is to leases in section 766, of the Code of 1880, chapter 17. The "whereas" or reason for the Act of 1880, is given in the words following: "whereas this section exempts the buildings and improvements of the lessee from state, county and municipal taxation; same in Code of 1892, section 4459, same Code 1906, section 5036; simple exemption from taxation in order to afford cheap board to the students. Chapter 17, Code 1880 section 785." There is a change made from the language of Code of 1871, and the last part of the section authorizes the university to accept donations. There is no change from 1880 to the present time as brought forward in the Codes of 1892, and 1906. Code of 1892, section 4460, Code 1906, section 5037, provides that University lands shall not be leased without provision for payment of annual rent to the University.



This covers legislation as to the leases authorized by the Act of 1860. There is nothing in any act to indicate the slightest authority in the board of trustees to add another term of years to the original lease for a term of years; on the contrary there is recognition of the fact that part of the land was leased and part not leased, throughout.

The trustees of the University have neither in term time nor at the end of the term of years the power to lease another term of years without legislative authority directly given. Such was not the intent of the law; words having a distinct, definite, ordinary and common-law meaning must be given that meaning. *Daily v. Swope*, 47 Miss. 367; *Hawkins v. Carroll County*, 40, Miss. 758. Every pivotal word or phrase, or sentence in the Act of 1860 is perfectly clear, definite and conclusive. Lease, for a term of years, in the first section of the act not only have the legal but common-law meaning; waste, in the second section of the act, together with the other words in connection therewith, the trustees authorized themselves or through another to protect the lands from waste, etc; so that both sections of the law are in perfect accord; a perfect law, a perfect lease, for a term of fifty years thereunder the language is plain and no subsequent action by the board of trustees of the University can becloud that plain and harmonious act and the lease thereunder; where the language is plain nothing is required or may be appealed to for its interpretation. *State v. Henry*, 87 Miss. 125; *Moss Point Lumber Company v. Harrison County*; 89 Miss. 448-588.

Has the board of trustees of the University of Mississippi a right under the Laws of 1860 to lease the lands for two terms of years; to add one term to another term thirty years before the expiration of the original lease, or at the termination thereof. A basis for such action cannot be found; the University of Mississippi lives by

virtue of our statutes. *Prima facie*, the statute will be interpreted not to bind the state; *Mayrhofer v. San Diego Bd. of Edu.*, 89 Cal. 110; *United States v. Hoar*, 2 Mason, 311; Bishop, Written Laws, sec. 142; Sedgw. Stat. & Const., L., page 337.

*Lee M. Russel*, for appellee.

The law under which the University was authorized to lease the lands, and by the way which authorized the state to bring this suit rather than the University, is set forth in Acts of 1860, page 178, chapter 118.

Pages thirteen and fourteen of record shows that the title to all the university lands is in the state and not in the University. Possibly the opinion is prevalent, that that which is known as University land belongs to the University, which as a matter of fact it, does not, but the title is wholly in this state as shown by the above deeds and has ever remained so.

Page seventeen of record shows copy of the order of the board of trustees June 29, 1892, authorizing this board to extend all leases for a period of twenty-five additional years.

Page eighteen of record, etc., shows the first deed of the University to Mrs. C. M. Malone dated October 29, 1872. Page twenty-one of record, etc., shows the deed of the university to Mrs. A. J. Barr and we call the court's especial attention to the last few lines of this deed which reads: (Latter part of page twenty-one of record.) "For an additional twenty-five years, and said extension to begin at the expiration of the term of fifty years," which record deed shows beyond any controversy that the proper state authorities stated just what they meant when, by the above words, they gave the twenty-five years extension from the expiration of the fifty years and not from any authorizing the board of trustees to grant renewal

or extension leases. Page twenty of the record shows Mrs. Barr's deed to appellee Mrs. Hamilton.

In appellant's brief he seems to claim as his sole and only argument that the state's agents, the board of trustees of the university, had no authority to grant a renewal or extension of any leases. Yet he gave no authority in point nor do we believe there is any authority that would hold that under the Statute of 1860, set forth in full above, that the board of trustees acting for the state did not have, and does not now have full and absolute authority to lease and re-lease these lands. They are the estate's agent; the state has seen fit to give them these powers, the power has never been changed since given in 1860 and why should they, by what right should a lease entered into in good faith as this case, be canceled when an innocent party is committing no waste and committing no injury but complying fully with their contract with a state official? Courts are for the purpose of dealing out justice and in maintaining contracts as written. We contend that by virtue of the Acts of 1860, *supra*, that just so long as there is a board of trustees that they have the full and exclusive right to represent this state in the leasing of these lands.

It is a universally recognized rule that a court of equity will compel specific performance by the lessor of his covenant and agreement to renew the lease." 18 Am. & Eng. Ency. Law, page 695. (C), and authorities therein stated. The case at bar is a much stronger right vouchsafed by law to the lessee than the above authority.

We feel sure that no sound holding can be cited, to show that the trustees acting under the authority of the law did not have the full right to lease and re-lease until such authority shall be taken from them. We respectfully submit that the argument advanced by appellant and the authorities cited, are not in point.

SMITH, C. J., delivered the opinion of the court.

This suit was instituted by appellant for the purpose of obtaining the cancellation of a lease executed by the trustees of the State University to certain land owned by the state and on which the University is situated. In 1872 the trustees of the University leased the land here in question for a term of fifty years to Mrs. C. M. Malone, and Mrs. A. J. Barr became the owner thereof—that is, of the lease—by mesne conveyances. This lease was executed pursuant to a statute, passed in 1860, which provides:

“Section 1. Be it enacted by the legislature of the state of Mississippi, that the trustees of the University of Mississippi be, and they are hereby authorized and empowered, to lease for a term of years, any part of sections No.—, township eight, range three west, lying east of the Mississippi Central Railroad, and being known as the tract of land on which the University of the state is located, to suitable persons, for the purpose of having residences or boarding houses erected thereon, for the accommodation of students, and under such restrictions as the board of trustees may impose: Provided, that it shall not be lawful for any person to erect or keep a business house for the sale or disposition of merchandise on said lands.”

In 1880 the laws relating to the University were brought forward in the Code of that year as section 745, which provides:

“The University of Mississippi, incorporated 24th of February, A. D. 1844, shall continue to exist as a body politic and corporate by that name and style, with all its property, real and personal, and with all the franchises, rights, powers and privileges heretofore conferred on it by law, or properly incident to such a body, and necessary to accomplish the end of its creation; and may receive, hold and dispose of all real and personal property conveyed to it for such purpose.”

In 1892 the trustees of the University granted to Mrs. Barr an extension of the lease formerly made to Mrs. Malone and now owned by her for a term of twenty-five years, beginning at the expiration of the first term, at a rental of "five dollars a year from the time of extension to the end of the extension," the new lease or extension to be forfeited upon failure of the lessee to pay any installment thereof. Both of these leases were assigned by Mrs. Barr to appellee, and the effort here is to cancel the second. One of the grounds upon which this is sought to be done is that the board of trustees was without power to execute it.

While the question is not without difficulty, we are of the opinion that the power granted to the trustees of the University by chapter 118, Laws of 1860, to lease lands, is a continuing one, and therefore was not exhausted as to each tract of land when a lease thereof was made, which power seems to have been again expressly granted to these trustees by section 745, Code of 1880. That the first lease had some time to run when the second was made was a fact which the board might, and very probably did, take into consideration in determining whether the second lease should be made, but has no bearing upon the question of its power to make the lease.

Another ground upon which it is sought to cancel this lease is that no payments have been made to the University of the rent reserved therein. This provision of the lease is somewhat ambiguous; but, construing it, as we must, most strongly against the lessor, it means that the rent reserved begins not from the date of the instrument, as contended by appellant, but from the time the extension or second lease begins, so that no payment to the University by appellee because thereof is yet due.

*Affirmed.*

## ALBRITTON v. FAIRLEY.

[77 South. 651, Division A.]

1. EVIDENCE. *Tax deed. Correction of description by extrinsic evidence.*

Where the tax assessment described land sold for delinquent taxes as "Mrs. N. M. Fairley, fifty feet on east half of lots 7 to 12, block 100, section 4, township 8, range 11, City of Gulfport," and the tax deed described the land as "One lot fifty feet on east half of lots 7 to 12," etc., lots 7 to 12 being one hundred and sixty feet long, running east and west. Therefore the description "East half of lot 7 to 12" would certainly designate the east eighty feet of these lots. The tax deed calls for fifty feet on this eighty foot tract. Whether this fifty feet be intended on the east or west end of this eighty-foot tract, the tax deed on its face does not disclose, but the assessment and tax deed furnish the clue which, when followed by the aid of other testimony, conducts certainly to the land intended, and in such case oral testimony and documentary proof may be introduced for this purpose.

APPEAL from the chancery court of Harrison county.

HON. W. J. Gex, Special Chancellor.

Suit by Jennie T. Albritton against Mrs. N. M. Fairley.

From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

*Griffith & Wallace*, for appellant and J. R. McDowell.

It was to meet just such cases as this that the statute, section 4285, was passed, although there has been much quibbling over it, and some few decisions have seemed bent on judicially repealing it, but those are not the later decisions. The later decisions have come back to the case of *Dodds v. Marx*, 63 Miss. 443, which upheld a description as follows: "Lot two and parts of lots one and three Harley plat in Hazelhurst, section 3 township 10, range 8 East, and the court held in that case, p. 446" (the description is the one quoted)

“was sufficient as it could be applied by the aid of parol evidence to lot two, and thirteen feet off lot three, square three, in the Harley plat and it was clearly shown that it was intended for these parcels. Compare that description in that case with what it was held it could be shown to cover, and then compare it with the case we have here, and we submit all supposed difficulty in our case disappears.

How the idea could ever have arisen in the face of the statute, and in view of such an often reaffirmed decision as the above that the assessment roll and the tax deed only could be looked to, is strange indeed. But it is even stranger when we find that the next two sentences in the *Dodds v. Marx* case has given rise to most of the quibbling. The opinion continues:

“The roll must furnish the clue which, when followed by the aid of parol testimony, conducts certainly to the land intended. It is admissible only to apply the description on the roll, which must give the start and suggest the course which, being followed, will point out the land intended to be assessed.”

A clue is defined by the dictionaries as “a hint or suggestion which guides one in an intricate case” and in *Herman v. De Moines*, 98 N. W. 609, it is said that a clue is a thing which, if followed up diligently, would lead to a discovery.

And yet in some decisions and the effect of the lower court's decision in this case is that the clue must be within itself full information, or a full description: in other words that the only clue that will do is an assessment that is a perfect description in itself, and in effect that there is no such statute as section 4285, Code 1906.

There is nothing to do here except by the aid of parol to apply the description on the assessment roll to the land here in question nothing in either has to be eliminated, nothing changed, nothing disregarded.

nothing to do but to apply or fit the fifty feet assessed to appellee in the east half of lots seven to twelve to the fifty feet in said east half of the said lots seven to twelve owned by her, it being the only fifty feet therein separately owned.

We cite *Railroad v. Leblanc*, *supra*, on this point also, and we call especial attention to the case *Wheeler v. Lynch*, 89 Miss. 157, and to the statement of facts of the case and how the proof was to be arrived at, the brief of appellant and the opinion of the court specially approving that brief.

The case *Reed v. Heard*, 97 Miss. 743, is also closely in point, and disposes of some of the cases which had seemed to hold a distinction as between latent and patent ambiguities, and which discusses the law much better than we could attempt to do it, and we cite also *Standard Drug Co. v. Pierce*, 111 Miss. 354.

*T. A. Wood and Denny & Denny*, for appellee.

It is insisted in this case by the appellant that lots No. seven, eight, nine, ten, eleven and twelve, in Block No. 100 is one hundred and sixty feet running east and west, that these lots were divided in halves, and that Smith owned the western half, eighty feet and that Stepsich and Mrs. M. N. Fairley owned the other half, Stepsich owning thirty feet off the east end and Mrs. M. N. Fairley owning forty feet.

The record herein shows that Smith owned the west half eighty feet. In order to prove where Mrs. Fairley's fifty feet was, the assessment of Stepsich was introduced at page No. 50 of said transcript, which are in these words: "D. N. Steppesich," thirty feet off west end, lots seven, eight, nine, ten, eleven, and twelve, in Block No. 100." Mrs. Fairley's assessment on the same page shows Mrs. Fairley's "fifty feet on east half of lots seven to twelve, in block 100." This is the only



assessment on the assessment roll and was introduced here to show that Stepesich owned the thirty feet off of the east end of these lots, whereas the assessment shows the west end. There is no other assessment of this eighty feet off the east end of these lots, except Mrs. M. N. Fairley's. The attempt to remove this defect was undertaken by introducing the deeds of Stepesich to show that he owned the thirty feet in the east end of the lots, without showing a payment of taxes on same, but if the taxes were shown to have been paid on this thirty feet of Stepesich, even in the east end, it would not remove the discrepancy for the assessment, which gives the clue, shows that the assessment was made in the west end. In support of same is cited *Dodds v. Marks*, 63 Miss. 443; in *Railroad Co. v. Leblanc*, 74 Miss. 650, and in *Wheeler v. Lynch*, 89 Miss. 157. Neither one of these cases has any reference to record of this kind.

It is useless to repeat what the 63 Mississippi had decided, but the 74th Mississippi goes on to speak about the evidence in an ejectment suit for the recovery of a piece of land whereby the plaintiff had had a decree confirming title and the controversy was over the question as to whether or not a deed to the land should be introduced in the ejectment suit to explain what was done in the chancery suit of confirmation. In that case there was thirty-eight acres assessed to one man and two acres to another, and the evidence was introduced to show who had the two acres and who paid the taxes on it, leaving only thirty-eight acres in that subdivision unpaid on. The court held that could be done for the reason that by the assessment and payment of taxes, it was shown that only thirty-eight acres in that subdivision was left to be paid on. There is nothing of that kind in this case; nobody paid, and there is only one assessment of fifty feet of this eighty feet half.

I think that the evidence of Mr. Wallace, as an expert draughtsman, fails to show that any plan or subdivision of block No. 100 was ever made. I think that Mr. Wallace's testimony is inadmissible.

HOLDEN, J., delivered the opinion of the court.

This is a suit to confirm a tax title to a lot in Gulfport. The defendant below successfully defended on the ground that the tax deed was void on account of uncertainty in the description. This is the only question of merit in the case. The assessment describes the lot as, "Mrs. N. M. Fairley, fifty feet on east half of lots seven to twelve, block 100, section 4, town 8, range 11, City of Gulfport." The tax deed describes the land as "one lot fifty feet on east half of lots seven to twelve," etc. The record shows that said lots seven to twelve are one hundred sixty feet long, running east and west. Therefore the description "east half of lots seven to twelve" would certainly designate the east eighty feet of these lots. The tax deed calls for fifty feet on this eighty-foot tract. Whether this fifty feet be intended on the east or west end of this eighty foot tract, the deed on its face does not disclose. But we think that the assessment and tax deed furnish the clue or reasonably definite starting point, which, when followed by the aid of other testimony, conducts certainly to the land intended, and oral testimony and documentary proof may be introduced for this purpose.

In the case before us the appellant offered to show by deeds of record that Mrs. Fairley, the delinquent in the tax sale of this tract, was the separate owner of the fifty feet on the east end of the east half of said lots seven to twelve when it was assessed, and that Stepich owned the other thirty feet in this eighty-foot tract, and that Smith owned the other eighty feet comprising the west end of said lots seven to twelve. The chancellor excluded this testimony as being incompetent. We think the court erred in not permitting this proof in aid of the description

in the tax deed. The description in the tax deed is ambiguous and uncertain, but it is sufficiently definite to come within section 4285, Code of 1906 (section 6919, Hemingway's Code), permitting oral testimony in aid of the ambiguous description, the uncertainty of which may thus be cured (*Dodds v. Marx*, 63 Miss. 443; *Railroad v. Le Blanc*, 74 Miss. 650, 21 So. 760; *Wheeler v. Lynch*, 89 Miss. 157, 42 So. 538).

The judgment of the lower court is reversed, and the case remanded.

*Reversed and remanded.*

---

CARMICHAEL ET AL. v. PARKS ET AL.

[77 South. 660, Division B.]

**ESTOPPEL.** *Deeds. Rights of parties. Fraudulent representations.*

Where parties in ignorance of the real facts are induced by misrepresentations to execute a deed to their lands, they are not thereby estopped from asserting their rights to the lands or from recovering the value thereof except as to *bona-fide* purchaser, for value without notice.

APPEAL from the chancery court of Neshoba county.  
HON. W. J. MUNN, Special Chancellor.

Suit between Mrs. Mary Carmichael and another and J. B. Parks and another. From a decree for the latter, the former appeals.

On suggestion of error, for former opinion see 76 So. 578.

The facts are fully stated in the opinion of the court.

*B. B. Carmichael*, for appellants.

"The burden is on the purchaser to show that the sale was made in good faith," citing *Jeffries v. Dowdle*, 61 Miss. 508.

Appellees cite a number of supposed authorities. Of course it is very easy for one to say "supposed authorities," but, decisions are only an authority when dealing with facts similar to those under consideration by the court. Taking this standard as a test, there is no authority which has applied the doctrine of estoppel to a state of facts the same as those presented by this record. Summarizing the cases cited by appellees relative to the proposition of estoppel, we find the cases of *Hafter v. Strange*, and that of *Bass v. Nelms*, a fair sample of the authorities insisted to be in point. In the *Hafter v. Strange* case the vendor was estopped for the simple reason, that a prospective purchaser came upon her premises and stated that her vendee had on record a title to more property than she intended to convey and that he was about to sell the property. What a wholly different state of facts from the instant case! Is there any evidence in this case to show that some one had appeared on the scene and informed these heirs, most of whom lived from one hundred and seventy-five to two hundred miles from any source of information, that Mrs. Parks and J. B. Parks had included in that deed forty acres of land that was not bought in by them under the deed of trust. Further in the *Hafter* case, upon examining the title on the record, a prospective purchaser found the same perfect. In the instant case what did the appellees find upon investigating the record of Neshoba county; this is what Williamson and Gipson say they relied upon; they, as a matter of fact shown undisputed in this record, found an attempt to substitute a trustee in the Rosenbaum trust deed; they found no evidence of title sufficient to withstand a suit in ejectment because this attempted substitution and the record bore no evidence that the same was there when the sale was made and that it was the act of the clerk in putting it there; neither was this instrument acknowledged to

entitle it to be placed there. Then of course he came to the trustee deed, executed by Rodgers to J. B. Parks. In reading this deed their attention was undoubtedly called to the fact that one thousand five hundred and fifty dollars worth of property was sold at a forced sale to satisfy an indebtedness of three hundred and eighty-five dollars and that three hundred acres of land was sold to bring that much—a badge of fraud within itself. This latter deed would also put him on notice that the trust deed did not cover all the land attempted to be conveyed to them. It will be remembered he was buying the property from M. J. Parks, the wife of J. B. Parks; certainly it then became necessary to find deeds from the heirs to this remaining forty at least, and what did he find? Not a sign of a deed from any of the heirs except Mrs. Dora Williamson and her brother, J. J. Whitten, who had no interest in the property. The deeds of course had been signed and delivered to J. B. Parks, by all the heirs except Frank Whitten, who had never signed any deed to either of the Parks, and this fact is admitted by the answer of the appellee's. In the case of *Bass v. Nelms*, 56 Miss. 502, was where the complainant after a full knowledge of his rights and after he had instigated a suit, compromised the same and was certainly precluded from further prosecuting the same. I utterly fail to conceive of any similarity of the facts in that case to the one under consideration. The Whitten heirs have never abandoned their suit for a moment.

Appellees in another place assert that complainants are estopped by laches and stale claims, for the reason that they never filed this suit until about seven years after they signed the deeds. The complainants showed that they instituted this suit immediately upon the discovery of the facts.

In the case of *McClusky v. Trussel et al.*, 90 Miss. 544, So. 69; a case absolutely analogous to the propo-

sition of the failure to sell in subdivisions, tried in 1906; a case where the purchaser had been in possession eight long years, where there was no element of fraud. On the trial of that case the chancellor, same as this one, denied the relief—on appeal the sale was declared void and the case reversed and remanded, in accordance with that opinion.

It has been said by our own court numerous times that under the law of this state. "There is no such thing as a stale claim properly so called."

*Z. A. Brantley*, for appellee.

The fact in this case that predominates absolutely is the fact that all of these heirs signed with their own hand and acknowledged a deed to Mrs. M. J. Parks, for the balance of a consideration in full of one hundred and thirty-two dollars, as full settlement for their interest in all the lands including the forty acres left out of the trust deed.

Fraud and misrepresentation seems to be the next head that appellant attacks this transaction under. Appellants contend that these parties complainant were entrapped into executing these deeds to the Parkes' not only to the land in the trust deed, but also as to the other forty acres of land. The record shows in this case, in exhibit number two, the original bill filed by G. W. and W. H. Mars, that in this bill the complainant set out the fact that all of these lands described therein, except the southeast quarter of the southeast quarter, section ten, township ten, range thirteen, was included in the trust deed, and that this southeast quarter of the southeast quarter was not in the trust deed at all. These complainants here were defendants in that suit and answered it fully, and this was before they finally executed a deed to their sister Mrs. M. J. Parks to their full interest in all of this land. This answers completely and

thoroughly confutes their statements and the statements made by their brother-in-law and attorney, that they had no knowledge but what this forty acres of land, that is the southeast quarter of the southeast quarter, section ten, township ten, range thirteen, was included in the trust deed.

The complainants contend that there was a fiduciary relation between these parties and that this naturally arises from the fact that they were brothers and sisters, and is a presumption of law, that seems to cling tenaciously in the mind of the attorney for the complainants. His wife, Mrs. May Carmichael, being the party, who after her marriage to Attorney Carmichael received this hundred and fifty-two dollars, admitted by her and receipted for her entire interest in the Whitten Estate, after she had such an eminent advisor as her learned husband to advise her in all of these matters. She signed this receipt and it was all right, and legal, and perfectly satisfactory until after he and she had spent this money, then with empty hands and anxious hearts they cry fraud and misrepresentation and fiduciary relations and every conceivable misrepresentation that could be thought of at that time. The facts show in this case, that not only were the heirs advised and knew all of the happenings in this behalf, knew that this forty acres of land, to-wit the southeast quarter of the southeast quarter, section ten, township ten, range thirteen, was not included in this trust deed, but that it was included in this last deed.

They admit that they did it, but say it was for the sole purpose to make the deed good to Williamson, an innocent purchaser who sought the land from the records which show an absolute and perfect deed in Mrs. M. J. Parks, signed by the heirs in this cause. And all of this fraud and misrepresentation and fiduciary relationship is based upon a letter that Mrs. Parks wrote to Mrs. Carmichael. The said letter was written from Louis-

ville, Mississippi, November 22, 1905, before the suit was filed by Mars, and in this letter Mrs. Parks asked one of the defendants, the wife of the attorney B. B. Carmichael, to explain to her about this matter. This letter says nothing except that they want a perfect deed and that she is willing to pay the heirs not only their share of what the property brought of the fifteen hundred and fifty dollars, but would be willing to pay them the overplus for what she could sell the land for, four hundred and fifty dollars, and that this meant to each one of the heirs one hundred and thirty-two dollars each, and this amount was paid.

The second ground set up in the motion is that Williamson and Gibson are holding the land under a title deed perfect as shown by these records, and are innocent purchasers for a valuable consideration without notice. These men purchased this land after all of these parties had executed a deed to their interest in these lands to Mrs. M. J. Parks, and this land was purchased after Mars' suit and after the deeds had been executed by these parties, and this land could not be subject in any event to the complainant's claim, and that raises the only question whether there would be a legal liability fixed upon Mrs. M. J. Parks and J. B. Parks.

The proof shows that each and all of these heirs received one hundred and thirty-two dollars each, and signed a deed conveying all their interest to the said lands included in the trust deed and the forty acres also.

The record and proof shows in this case that there was no fraud or collusion or misrepresentation whatever, that each and all of the complainants here who at the time were *sui juris*, understood the whole matter thoroughly and knew what interests and rights they had in the said property, and that the agreement between these parties as shown, was accepted by all of them. One of these complainants whose husband was an attorney, who was called upon to give his consent and to advise



his wife in this matter. There could be no fraud in this behalf and none was practiced. No unfair advantage was taken and these complainants are now estopped from denying their deeds as shown in this behalf. Each and all of these complainants had ample time from the beginning of this litigation until its finale to have settled all matters bearing upon their interest, and these diverse litigations were certainly enough to have put them on notice and to have at least done this sufficiently to protect an innocent purchaser. *Haft v. Strange*, 65 Miss. 323, 3 So. 190, 7 American State Reports, 659. This language is there used: "One who claims that a deed signed by him was procured by fraud, and who knows that the grantee is trying to sell the property but remains inactive until after the sale thereof is effected is estopped from maintaining an action against an innocent purchaser to vacate the deed."

These complainants admit that on the reception of this letter that they were advised that Mrs. Parks desired this deed for the purpose of selling this land, and in the brief of counsel they emphasize the fact that on account of the ignorance of the vendee, that it would better assist and aid the vendor, Mrs. J. B. Parks, in selling this land if they would sign this deed, an admission that clearly and unquestionably estops each and every one of these complainants. *Knapp v. Bailey*, 1 Am. St. Rep. 295; *Bass v. Nelms*, 56 Miss. 502; *Field v. Weir*, 28 Miss.—; *Edwards v. Roberts*, 7 S. and M. 555; *Hanson v. Fields*, 10 Miss. 712.

These complainants are estopped upon their consent and ratification of others in general and their laches in this behalf. They never filed this bill until more than seven years after they had signed these deeds and ratified these acts to these parties. *Vicksburg R. R. Co. v. Ragsdale*, 54 Miss. 200; *Cross v. Hendrick*, 7 So. 69, 66 Miss. 61.

“The receipt of the purchase money of land of an estate sold under a void decree of the probate court estops the heirs from contesting the title of the beneficiary. *Willie v. Brooks*, 45 Miss. 542.

In the case at bar, these complaints after all this litigation and the questions of titles had been gone over thoroughly, executed to Mrs. M. J. Parks, one of the defendants in this cause, a deed to all their interests in the said lands for a valuable consideration, and they are now estopped from denying their deeds; first, because these complainants assisted in every way they could to sell this land as shown by the letter, quoted, marked exhibit A to the first original bill. *Hafter v. Strang*, 7 Am. St. Rep. 659, 65 Miss. 323, 3 So. 190, where this language is used: “A grantor who claims that a deed signed by him was secured by fraud, and who knows that the grantee was trying to sell the property but remains inactive until the sale thereof is effected, is estopped from maintaining an action against an innocent purchaser to vacate the deed.”

“The grantor in the absence of the proof of fraud is estopped by the consideration clause in the deed from alleging that it was executed without consideration.” 64 Miss. 253, 43 Miss. 260.

“One who takes the benefits of a consideration of a deed in his favor which was made part of a transaction is estopped.” 82 Miss. 233, 33 So. 974.

We submit that this cause should be affirmed.

ETHRIDGE, J., delivered the opinion of the court.

This case was affirmed on a former day without an opinion. 76 So. 578. A suggestion of error was filed, and we have re-examined the record and have reached the conclusion that we were wrong in affirming the case.

Mrs. M. E. Whitten and J. A. Whitten, in their lifetime owned a body of land in Neshoba county, Miss., and prior to their death executed a deed of trust to C. Rosenbaum upon the lands owned, with the exception of the southeast

quarter of the southeast quarter, section 10, township 10, range 13 east. The complainants and the defendant Mrs. Parks were children of Mr. and Mrs. Whitten; J. B. Parks being the husband of the defendant Maggie Parks. Mrs. Parks acquired the deed of trust from C. Rosenbaum by purchase, and after the death of her father and mother had the lands embraced in the deed of trust sold through a substituted trustee, and J. B. Parks bid in the land at and for the sum of one thousand five hundred and fifty dollars, and thereafter conveyed it to Mrs. Parks, the deed of trust being for three hundred and eighty-five dollars, and about some three years' interest. Subsequent to the sale by the trustee, Mr. and Mrs. Parks, desiring to sell the land, found a purchaser, but this purchaser was not willing to buy the place unless all of the heirs signed the deed. Thereupon Mrs. Parks wrote Mrs. Carmichael and other of the complainants a letter, containing the following:

Louisville, Miss., Nov. 22, 1905.

"Dear May: You will find enclosed a deed for the place Mr. Parks bought the place when sold at one thousand five hundred and fifty dollars, and is going to sell to another man for two thousand dollars but he is a little ignorant and thinks the deed will not be good unless all of you sign it. Saydee, Mollie and I signed but Dora was not dressed when Mr. Rodgers went down and could not but will and then we will have to send to John, Frank and Tate. But here now understand Mr. Parks is going to give you all the benefit of the four hundred fifty dollars over what the place sold for. The deed to him now is perfectly good, only to satisfy this man that he wants you all to sign. You will have to sign before an officer, and it will be about a twenty-five cent or fifty cent cost. But you see by you all doing this he will give four hundred and fifty dollars when if not the place will only be one thousand five hundred and fifty dollars. Now attend to this matter and return by return mail as we want

the others to by the 15th, of December. Now May do not think that you are getting yourself into anything by this for you are not and any way the deed to Mr. Parks is good anyway and if you do not sign you will cut yourselves out of four hundred and fifty dollars. Get Ben to explain if you do not understand. This is just to get the man to be satisfied, while the deed to him is good as it is but he does not understand it. So sign and return," etc.

"Lovingly,

MAGGIE."

The deed inclosed with this letter in fact contained all of the land of Mr. and Mrs. Whitten, including the southeast quarter of the southeast quarter, section 10, township 10, range 13 east, above mentioned. The testimony in the record shows that the heirs did not know the lands by description, and shows that they were under the impression and understanding that they were conveying the land sold under the deed of trust and not selling the southeast quarter of the southeast quarter, upon which the old family residence was situated. The bill attacked the trustee's sale and attacked the appointment of the substituted trustee and the good faith of the purchasers from Mr. and Mrs. Parks, and the record is somewhat complicated.

We think the letter above set out tended to assure the complainants that the trustee's deed was all right, and that the land embraced in the deed which they signed only embraced lands in the trust deed, and that, under the most favorable view for the appellees, the deed to them was signed without knowledge of the fact that the southeast quarter of the southeast quarter, containing the homestead, was embraced in the deed; and while the deed signed by the heirs to Mrs. Parks would be good as to *bona-fide* purchasers of the land, it would not estop the complainants from asserting their rights to the southeast quarter of the southeast quarter, or from receiving the value of such land.

The chancery court should have granted the relief prayed for as to this land, and to this extent the decree will be reversed, and the cause remanded.

*Reversed and remanded.*

FOOTE-PATRICK Co. v. MERKLE.

[77 South. 661, Division A.]

1. **EXECUTION.** *Sale. Transcript from justice of peace. Filing. Code 1906, section 3997.*

Code 1906, section 3997 (Hemmingways Code, Section 3004), providing that the title to land sold under execution issued by a justice of the peace shall not be complete in the purchaser until he shall have obtained from the justice a certified transcript of the proceedings had before him in the suit, etc., which shall be filed with the conveyance made by the officer in the chancery clerk's office, and recorded with the conveyance, applies where the execution was issued by the circuit clerk upon an enrolled judgment rendered by a justice of the peace as well as where the execution was issued by the justice of the peace.

2. **SAME.**

The object of this statute is to place on record a permanent memorial of the judgment and execution, beyond the danger of loss from the many contingencies incident to the books and papers of justices of the peace, and also to have on record at the courthouse the evidence constituting a muniment of title to land.

3. **SAME.**

The record filed with the circuit clerk in order to obtain the enrollment of a judgment rendered by a justice of the peace does not meet this requirement, being in fact simply a mere abstract of the judgment itself.

APPEAL from the chancery court of Jasper county.

HON. G. C. TANN, Chancellor.

Suit by J. B. Merkle against the Foote-Patrick Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

116 Miss.—46

*Shannon & Shauber*, for appellant.

The third proposition relied on by appellee is that appellant did not file for record with the deed made him by the sheriff, a transcript of the judgment of the justice of the peace, and a copy of the execution under which said land was sold. Appellee relies on section 3997 of the Mississippi Code of 1906, which is as follows:

“The title to land sold under execution issued by a justice of the peace shall not be complete in the purchaser until he shall have obtained from the justice a certified transcript of the proceedings had before him in the suit, including a copy of the execution and the officer’s return on it, which shall be filed with the conveyance made by the officer in the chancery clerk’s office and recorded with the conveyance; and upon filing such transcript and conveyance for record in the chancery clerk’s office of the county where the land lies, the title of the purchaser shall be as full and complete as if the sale had been under a judgment and execution from a circuit court.”

Our contention is that the code only requires the transcript of the judgment of the justice of the peace and a copy of the execution issued thereon to be filed with the deed in cases where the execution was issued by the justice of the peace. The code specifically states: “The title to land sold under execution issued by the justice of the peace, shall not be complete,” etc. At the time this section of the code was adopted, the clerks of the circuit court had no authority to issue an execution on an enrolled judgment of the justice of the peace, but section 3481 of the Annotated Code of Mississippi Code of 1906, for the first time authorizes clerks of circuit courts, in whose office any judgment or decree shall be enrolled, may issue execution writs and writs of garnishment thereon, directed to any lawful officer of his county, returnable before the court which rendered the judgment or decree.

We admit that the cases of *Hughston v. Cornish*, decided by this court in April, 1892, and *Dunlap v. Fant*, decided by this court in October, 1896, and reported in 74 Miss. 198, seem to support counsel for appellee in his contention. However, we think each of these cases can be distinguished from the case now before the court. In the first place, the execution in neither case was issued by the clerk of the circuit court on an enrolled judgment, as was done in this case. We think the reason for the distinction between these cases and the case at bar is a good and sufficient one.

In the case of *Hughston v. Cornish*, *supra*, Judge CAMPBELL, states the object and purpose of said section 3997, of the Code of 1906, as follows: "The object is to place on record a permanent memorial of the judgment and execution beyond the danger of loss from the many contingencies incident to the books and papers of justice of the peace, and also to have on record at the court house the evidence constituting a muniment of title to land."

We submit that the muniments of title in this case are of record at the court house subject to inspection. In the first place the appellant obtained an abstract of his judgment, and had it filed and enrolled in the office of the clerk of the circuit court of the second district of Jones county, the district and county in which the land lies. The circuit clerk, on issuing the execution under section 696, of the Mississippi Code of 1906, is required to: "Keep a docket, in which he shall enter every *capias pro finem* and all executions issued by him, specifying the names of the parties, the date, the amount of the judgment or decree and of costs, the name of the officer to whom it is delivered, to what county directed, the date when issued, and the return day thereof; and, when the same is returned, shall, without delay, record the return at large on the same page of the docket. And the execution docket shall be kept duly indexed, both

directly and indirectly, in the alphabetical order of the names of each of the parties.”

When a sale is made, the sheriff, under section 4680, of the Mississippi Code of 1906, is required to “keep a well bound book, to be called the “Execution Docket,” in which he shall note each execution received by him, specifying the names of all the parties, the amount and date of the judgment, the court from which issued and when returnable, the amount of the costs, and date when the same was received, and all levies and other proceedings had thereon; and said book, at the expiration of the office of such sheriff shall be delivered to his successor to be kept by him as a public record.”

As heretofore stated, in the cases annotated under the section 3997, the executions were not issued by the circuit clerk, but by the justice of the peace, and under the strict construction of the section it was necessary, in order to make the deed valid, for the purchaser to have obtained from the justice a certified transcript of the proceedings had before him in the suit, including a copy of the execution and the officer's return under it, and file the same with his deed in the office of the clerk of the chancery court of said county.

Since the reason for the rule no longer exists, or at least does not exist where the execution is issued by the circuit clerk, and the sale made by the sheriff, the statute should be, in our opinion, strictly construed, and be confined to executions issued by the justice of the peace.

*C. W. Thigpen*, for appellee.

Does the sale made by the sheriff convey any title by reason of his failure to file a certified transcript of the proceedings had before the justice of the peace? There can be no dispute, as we take it, as to the rule in this case. They agree that no transcript was filed as required by section 3997 of the Code of 1906. The fact



that the judgment was enrolled and the execution was issued by the circuit clerk, cannot avail them anything, for the reason that this was a judgment rendered by the justice of the peace. See *Dunlap v. Fant*, 74 Miss. 87; *Beeks v. Rye*, 77 Miss. 358. Even though every other contention made by the appellant were conceded, they could not have any standing in the court on account of the failure to file this transcript. It makes their deed void, their deed being void, they have no valid claim whatever to the lands in question.

We submit, that these propositions appear to be so strong in behalf of the appellee, that the case should be affirmed.

SMITH, C. J., delivered the opinion of the court.

This suit was instituted by appellee to foreclose a vendor's lien upon certain land sold by him to W. F. Ware and afterwards purchased by Foote-Patrick Company at a sale under execution issued on a judgment rendered by a justice of the peace against Ware. The judgment was enrolled in the office of the circuit clerk, and the execution issued by him returnable to the justice of the peace. No transcript of the proceedings had before the justice of the peace in the suit in which the judgment against Ware was rendered was filed with the deed executed by the sheriff to Foote-Patrick Company pursuant to the sale under execution and enrolled in the office of the chancery clerk. Ware failed to answer, and there was decree *pro confesso* against him; but Foote-Patrick Company filed an answer and cross-bill, resisting enforcement of the vendor's lien for reasons not necessary to be here set out, for the court below, in granting the prayer of the original bill, correctly held that Foote-Patrick Company had acquired no title to the land under the execution sale. Appellant's contention is that section 3997, Code of 1906, Hemingway's Code, section 3004, which provides that:

“The title to land sold under execution issued by a justice of the peace shall not be complete in the purchaser until he shall have obtained from the justice a certified transcript of the proceedings had before him in the suit, including a copy of the execution and the officer’s return on it, which shall be filed with the conveyance made by the officer in the chancery clerk’s office and recorded with the conveyance,” etc., has no application here, for the reason that the execution was not issued by a justice of the peace, but was issued by the circuit clerk upon the enrolled judgment. There is no merit in this contention, for the manifest purpose of the statute is to require the recording of such a transcript, etc., with any deed made pursuant to a sale under execution issued upon a judgment rendered by a justice of the peace. As stated in *Hughston v. Cornish*, 59 Miss. 372:

“The object is to place on record a permanent memorial of the judgment and execution, beyond the danger of loss from the many contingencies incident to the books and papers of justices of the peace, and also to have on record at the courthouse the evidence constituting a muniment of title to land.”

The record filed with the circuit clerk in order to obtain the enrollment of a judgment rendered by a justice of the peace does not meet this requirement, being in fact simply a mere abstract of the judgment itself.

*Affirmed.*

## HELM v. SHEEKS ET AL.

[77 South. 820, In Banc.]

1. WILLS. *Execution. Secondary evidence. Probate.*

When a will is presented for probate, secondary evidence cannot be used to establish its due execution, if any of the subscribing witnesses will and can prove the facts until they have been called or produced.

2. WILLS. *Execution. Secondary evidence.*

Where a subscribing witness to a will was not within the state and an effort was made to take his deposition which was unavailing and counsel for the proponent of the will was led to believe that the witness would be at the trial, and that he would be a hostile witness. In such case it was competent to produce other witnesses bearing on the execution of the will, the sanity of the testatrix, and the question of undue influence.

3. WITNESSES. *Will. Contest. Testimony of interested party.*

The testimony of a party cannot be received to establish or to destroy a will where the party testifying would become the recipient of the property of the decedent or some portion thereof.

4. WILLS. *Trial. Questions for jury.*

Under the facts as set out in its opinion in this case involving the validity of a will, the court held that the issues of execution, sanity of testatrix, and undue influence, should have been submitted to the jury.

APPEAL from the chancery court of Noxubee county.

HON. ALBERT Y. WOODWARD, Chancellor.

Proceeding by Mrs. M. T. Helm to probate a will. Mrs. W. B. Sheeks and others filed a *caveat*. From a judgment for the latter, the former appeals.

The facts are fully stated in the opinion of the court.

I. L. Dorroh, Strong & Bush and Walker & Wooten, for appellant.

A. T. Dena, Geo. Richardson, Green & Green and H. H. Brooks, for appellee.

ETHRIDGE, J., delivered the opinion of the court.

The appellant, Mrs. M. T. Helm, presented for probate a paper purporting to be the last will and testament of Miss Sarah Alice Brooks. The alleged will reads as follows:

"The State of Mississippi.

"I, Sarah Alice Brooks, do make & publish this to be my last will and testament—

"Item 1st. I give and bequeath to my sister Mary T. Helm my entire estate—real and personal which I may own at the time of my death.

"Item 2. I appoint her my sister Mary my executrix and relieve her from giving security on her bond as executrix. If I leave any debts unpaid they will be small & my sister is charged to pay them out of my estate & it will be unnecessary to file any inventory of my estate or to make any reports to the court.

"In testimony hereof I sign my name hereto on this the 23d day of February, 1897.

"S. A. BROOKS.

"In our presence as witnesses:

"T. O. BURRIS.

"C. R. SMITH."

When the will was presented for probate there was an affidavit made by T. O. Burris, one of the subscribing witnesses, in which he interlined the usual affidavit with the following expression:

"To the best information and belief of this deponent of sound and disposing mind, memory and understanding and above the age of twenty-one years," etc.

A *caveat* was filed by the appellees against the probate of the will, and the clerk thereupon declined to probate the alleged will. The appellees then filed a bill in the chancery court, alleging that the instrument was not the last will and testament of Miss Brooks, and that she was insane or mentally incompetent to make a will; and also

that she was under the control and influence of Mrs. Helm, and that the alleged instrument in writing was obtained by undue influence. A motion was made to strike the bill from the files, which was overruled, and thereupon the appellant answered the bill, denying the material allegations of the bill.

On the trial of the cause T. O. Burris was produced as a witness for the proponent of the will but his recollection of the transaction had completely vanished, and he was unable to testify as to any of the material facts, except to say that he recognized his signature to the will as being genuine, and that he must have seen the party sign the instrument or he would not have signed it; that he never signed anything without knowing what he was signing. He was unable to recall any of the circumstances or any of the parties, and could not say from recollection whether the party S. A. Brooks who signed the will was a man or woman, or any other fact pertaining thereto.

C. R. Smith, the other subscribing witness, was not produced at the trial, the proponents claiming that he was a hostile witness, and that the contestants had made an affidavit for a continuance at a former term of court, and had secured a continuance because of the absence of C. R. Smith, who, it was alleged in the affidavit, was a material witness for the contestants, and in which it was stated that the contestants expected to prove by the said Smith that S. A. Brooks never executed said will, never signed the same in his presence, never published or declared the said instrument to be her last will, and did no act to indicate that the said will was the will of the said S. A. Brooks, and, further, that she was absolutely under the influence of Mrs. Helm, the proponent, at the time the instrument purported to be witnessed. Between the time the motion for a continuance was made and the same secured and the trial of the cause, the contestants propounded interrogatories to C. R. Smith, to be sent to the state of California, where Smith then was, or was

supposed to be. The interrogatories, however, were returned unanswered; Smith not being at the place to which they were sent. There was no effort on the part of the proponent of the will to secure the deposition of Smith, other than to cross the deposition above mentioned proposed to be taken by the contestants, nor was there any summons or effort to secure Smith's attendance at court until the day preceding the trial, when a subpoena was issued to Noxubee county for Smith and returned "not found." The attorneys for the proponent say, however, that they had a conversation with one of the attorneys for the contestants two or three days before the trial, in which they asked if Smith would be present, and claim that the said attorney informed them to be ready for trial; that Smith would be at the trial. They further testify that they received a report that Smith was in the county on Sunday preceding the trial, in company with one of the contestants, and that on Monday following they issued the subpoena and fully expected Smith to be present, and that they were expecting him to be produced or appear at the trial when they answered ready for trial. It appears that Smith had been confined at the insane asylum at Meridian, and that after he was released from said insane asylum, or some thirty days thereafter, he went to California in search of health. It appears that his permanent residence was in Lowndes county, but it does not appear that he had been at his residence since going to the state of California, and it does not appear that he had returned to the state of Mississippi after going to the state of California.

In the absence of Mr. Smith, and without a formal summons having been issued for him other than as above stated, the complainants produced Hon. J. A. Orr, an attorney of Columbus, Miss., who drafted the instrument purporting to be the will, who testified that he had known Sarah A. Brooks for a long time, and was intimately acquainted with her family; that he pre-

pared the will at her request, out of the presence of Mrs. Helm, who came with Miss Brooks to his office, and that he procured Burris and Smith to sign the will as witnesses after it had been prepared; and that the will was signed by them in the presence of Miss Brooks and himself. He further testifies that he saw nothing to indicate unsoundness of mind on the part of Miss Brooks; that he regarded her as competent to make a will at the time; and that there was nothing to indicate to his mind that any undue influence was exerted by Mrs. Helm.

The proponents also introduced Z. T. Dorroh, who had formerly been sheriff and chancery clerk of Noxubee county, and lived in Macon, Miss., for a long number of years as a near neighbor of Mrs. Helm, with whom Miss Brooks lived during the latter part of her life until she was sent to the insane asylum in 1911. He testifies that Miss Brooks came to him shortly before the alleged will was written, and requested him to write her will, but that he declined to do so, and suggested that she get a lawyer to prepare the will; that she asked him if Mr. Orr would do, and that he stated to her that Mr. Orr was a suitable person to write her will; that shortly after the will was prepared she brought same to him, and stated that Mr. Orr had written her will, and requested him to keep the will in his safe or possession, which he had done. He testifies that at that time Miss Brooks was of sufficient mental capacity to make a will.

W. B. Helm, a son of the proponent of the will, was also introduced and testified that he had known Miss Brooks, who was his aunt, practically all his life, he being at the time about forty-five years of age, and that he had attended the same school with Miss Brooks when he was a small boy, and testified that the signature to the alleged will was the signature of Miss Brooks.

The proponent, Mrs. Helm, tendered herself as a witness to establish the will and to testify to all necessary elements involved in the contest. The chancellor excluded her evidence on the theory that she was incompetent to establish the will, as to do so would be to establish her claim against the estate of said Sarah A. Brooks.

The contestants were related to the deceased as nephews, nieces, great nieces and nephews, being the descendants of H. H. Brooks, Sr., a brother of deceased.

At the conclusion of proponent's testimony the chancellor sustained a motion to strike out the evidence, and granted a peremptory instruction for the contestants, and this appeal is from the final judgment accordingly entered.

The following propositions are presented for decision in this case: (1) Was it necessary for the proponents of the will to produce C. R. Smith, or make a satisfactory showing for not producing him? (2) Was Mrs. Helm a competent witness to establish the will? (3) Was there sufficient evidence to justify the submission of the case to the jury on the issues involved?

The statute requires two witnesses to witness the execution of a valid will, and the purpose of the statute in requiring witnesses is not only to establish the writing or signing of the instrument, but to have witnesses whose business it is to determine the capacity of the testator making a will. In our opinion, it was the duty of the proponent to produce Smith if he was in the jurisdiction of the court, or to take his deposition if that could be done, as the subscribing witness Burris wholly failed to recall any of the facts and circumstances attending the execution of the will, and could not recall whether it was a man or a woman making the will. The testimony of the subscribing witnesses is the best evidence, and their testimony has been selected by the decedent to prove the essentials of the execution of the



will. If the subscribing witness cannot be produced, or, if produced, will not testify to the execution of the will, or are not able to recall the facts, then other evidence may be offered, but secondary evidence cannot be used if any of the subscribing witnesses will and can prove the facts until they have been called or produced.

The statute requires at least one witness to prove the execution of the will. Taking this record, however, and all that appears therein, it warrants the belief and finding that Smith was not at the time within the jurisdiction of the court. When last heard from, so far as the record shows, he was in California, and it does not appear that he had returned to Mississippi, and it does appear that an effort was made to take his deposition, but which was unavailing. It further appears that counsel for the proponent was led to believe that Smith would be at the trial, and that he would be a hostile witness. In this state of the record we think it was competent to produce other witnesses bearing on the execution of the will, the sanity of the testatrix, and the question of undue influence.

With reference to the exclusion of the testimony of Mrs. Helm, we think the chancellor was correct in so doing, under the doctrine of *Cooper v. Bell*, 114 Miss. 766, 75 So. 767, and *Whitehead v. Kirk*, 104 Miss. 776, 61 So. 737, 62 So. 432, 51 L. R. A. (N. S.) 187, Ann. Cas. 1916A, 1051. In the *Whitehead v. Kirk Case* the decisions of this court were reviewed at some length, and the proposition established that a person who would be the heir of the maker of a will in the event of his death without a will could not testify as to mental incapacity of a testator, the effect of which would be to destroy the will and establish her rights to his estate. It is urged here that the claim of Mrs. Helm would not become effective until the death of Miss Brooks, and therefore that the testimony was not to establish a claim

against the estate originating in the lifetime of the decedent. The claim or right to the estate does not become vested until death, but its foundation is the will, and the will, of course, must be made during the lifetime of the testator. To establish a will is to establish an instrument made in the lifetime of a person by which the estate of such person will be vested at his death. The claim flowing from the will necessarily originates with the will. It is true it may be destroyed and rendered ineffectual, possibly, and it is true, further, that it will not take effect until death, but it is an instrument of title which, in the nature of things, must be made during the lifetime of the testator, and must be signed and witnessed in the manner prescribed by statute during the testator's lifetime. We think these two cases fully establish the doctrine that the testimony of a person cannot be received to establish or to destroy a will where the party testifying would become the recipient of the property of the decedent or some portion thereof. Therefore the chancellor did not err in excluding Mrs. Helm's testimony.

As to the third proposition, we think the proof was sufficient to go to the jury on each of the issues made. While the testimony of Smith and Burris is the best evidence, yet if they cannot be produced, or if, on being produced, do not remember the facts, other evidence may be received to establish the will. Taking the evidence of Judge Orr, Mr. Dorroh, and Mr. Helm, we think the issues should have been submitted to the jury, and the court committed error in refusing to do so. The judgment will be reversed, and the cause remanded for a new trial.

*Reversed and remanded.*

STEVENS, J. (specially concurring). I concur in the result reached by the court that the case must be reversed. I concur on all points discussed in the opinion of

the court except the one and important question as to the competency of Mrs. Mary T. Helm as a witness in her own behalf. On this point I dissent from the holding of the court, and it is upon this point alone that I express my views. The vital question is, Shall a legatee be admitted as a competent witness to support the will? According to the previous decisions of this court and abundant authorities elsewhere, both American and English, the legatee may testify in support of the will under which she claims. This question has been expressly decided by our court at least three times, and in each instance the legatee was held competent. In *Kelly et al. v. Miller*, 39 Miss. 17, this exact point was assigned for error. In the statement of the case by the reporter it is said:

Samuel R. Miller was first introduced by the pro-pounders of the will, and his testimony was objected to by the petitioners, because he was the executor, of the will and principal legatee and devisee under the will, and was incompetent on the ground of interest. The objection to his testimony was overruled, and he was permitted to testify, and a bill of exceptions was taken to the ruling of the court."

In disposing of this objection our court, by HARRIS, J., said:

"The only error in law assigned, so far as we are able to ascertain from the arguments of counsel, . . . is that the testimony of Miller, the devisee, legatee, and executor under the will, was allowed over the [objections] of appellant. On this point it is urged that, inasmuch as by our Code (page 434, art. 45) a devise or bequest to a subscribing witness to a will is declared to be void under certain circumstances, any devisee or legatee, whether a subscribing witness or not, is incompetent to testify when called to support a will in his favor. There is certainly no force in this objection."

In addition to article 45 of the Code of 1857 referred

to by the court, making a devise or bequest to a subscribing witness void under the limitations therein mentioned, there was in existence the basis for our present statute making witnesses incompetent to establish their own claims against the estate of a deceased person. Article 190, p. 510, Revised Code of 1857, expressly provided that no person should be a witness to establish his own claim to an amount exceeding fifty dollars against the estate of a deceased person. But in the face of both these statutes Miller was permitted to testify to establish the will.

About twenty-two years after the decision in *Kelly et al. v. Miller, supra*, our court expressly decided the point again in *Tucker v. Whitehead*, 59 Miss. 594. The court by CHALMERS, J., said:

"First, there was no error in permitting the proponent, who was the principal legatee under the will, to testify in support of it. *Kelly v. Miller*, 39 Miss. 17. The point is decided the same way, though under statutes the phraseology of which is not identical with ours, in Massachusetts and Missouri. *Shailer v. Bumstead*, 99 Mass. 112; *Garvin's Adm'r v. Williams*, 50 Mo. 206 . . . The contestant was admitted to testify without objection in *Mullins v. Cottrell*, 41 Miss. 291; and, though we find the point expressly decided in very few cases, yet an examination shows that it has been quite generally done without objection, both in this country and in England."

In *Covington v. Frank*, 77 Miss. 606, 27 So. 1000, our court had for consideration the question whether persons whose heirship is denied are competent persons to prove their relationship. In the reasoning of the court on this point, our court adopted as a correct premise for argument the admitted fact that a legatee or devisee could testify to establish a will, and cited for the argument the two cases above mentioned. The language of the court by TERRAL, J., is significant. Our court there said:

"In *Tucker v. Whitehead*, 59 Miss. 594, and in *Kelly v. Miller*, 39 Miss. 17, it is held that a person claiming title or right under a will may testify to establish the will by which their title to the estate of the testator is established; a like construction authorizes a person to establish his title to the intestate's property by his own oath. They are parallel cases in every respect. If section 1740 did not exclude Mary Whitehead from testifying in *Tucker v. Whitehead*, or Miller from testifying in *Kelly v. Miller*, it ought not to exclude Mary Covington and Cornelia Miller from testifying in this case. The title of Mary Whitehead accrued upon the death of Covington. In neither case did the title originate in the lifetime of the testator or of the intestate, and both are competent witnesses."

There is a further significant statement in the opinion of the court in the *Covington Frank Case* that our present statute, at that time section 1740, Code of 1892, is in the nature of an exception to the statute removing the disabilities of parties to a suit existing at common law, and that our present statute "excepts from that right or benefit the persons therein named; and it is a rule in the construction of statutes that exceptions must be strictly construed." And again the court says:

"Neither wife nor child has any interest in the property of the husband and father during his lifetime; dying intestate they would be his heirs, and to prove their relationship to him is to prove their title to his property by descent when cast; but it is not to prove a claim that originated in his lifetime. At the death of a person, dying intestate, *eo instanti* the title of the heirs accrues."

And so I assert with confidence here that Mrs. Helm, the legatee or devisee under the will propounded, had no claim which, in the language of the statute, "originated during the lifetime of such deceased person," the testatrix. Her title and claim is based upon

and through the will. It is a self-evident proposition that a will does not speak until the testator's death. The will begins where life ended. The very nature of the will, that quality without which it would not be a will, makes it effective only after the death of the testator. So it is that under the literal and plain language of the statute a legatee is not asserting a claim which originated in the lifetime of the deceased. There is no case, unless it be the recent case of *Cooper v. Bell*, 114 Miss. 766, 75 So. 767, decided by Division A of this court, that has ever declared the legatee or devisee an incompetent witness. I cannot give my consent to such holding. It is inconceivable to me that the legislature in enacting our statute had any such intention. The claim of the legatee is not based upon oral testimony. The claim is based upon the solemn last will and testament, a writing which speaks for itself. It ought not to be objectionable or even against the spirit of the statute for a legatee to identify this document or to resent any imputations of fraud or undue influence or to rebut any testimony offered by the contestant to that effect. To shut the mouth of the legatee when there is a contest of the will is to place the legatee in an attitude where he cannot defend himself. We are taught that every one has the right of self-defense and the right to enjoy life, liberty, property, and the pursuit of happiness. A legatee should have, and under the plain terms of our statute does have, the right to defend the will against unwarranted charges of fraud or undue influence, and to protect his own reputation and character. Our court so ruled in *Jamison v. Jamison*, 92 Miss. 469, 46 So. 83, 945. A contrary rule would permit the contestants to introduce an unscrupulous witness to testify to a state of facts tending to show undue influence by the legatee and to place the setting and circumstances in such way as to require the positive testimony of the legatee to rebut or overthrow the effect of such evidence. In the present case severe and

sweeping charges are made by the contestants of fraud and undue influence on the part of M. T. Helm, even to the extent of charging that the testatrix "was virtually kept a prisoner by the said M. T. Helm." It is not proper here to comment upon the testimony that was introduced, or that possibly will be introduced on a retrial of the case. I do say, however, that the contestants have raised serious issues, the truth of which reflects upon the character of the legatee. In supporting the charge of undue influence generally the *onus* is upon the contestants. Of course I concede that a *prima facie* case must be made by the proponents. The only proof of insanity or mental incapacity thus far shown is that the testatrix was an epileptic. The authorities do not class this as insanity, and the proof tends to show thus far that for many many years after the execution of the will now contested the testatrix was in no worse condition mentally than she was at the time the will was executed. Unless she was mentally capable of executing a will, the testatrix could not be subject to undue influence. Mrs. Helm is shown to have been present in the law office of Judge Orr at the time the will was prepared, but she was in a different room and took no part whatever in suggesting or explaining to the judge what was to be incorporated in the document. It is stated by Mr. Schouler that:

"The mere presence of a beneficiary under a will at its execution is not improper, suspicious, or objectionable, where no proof appears that he actively instigated the business." Schouler on Wills, Executors, and Administrators (5 Ed.), par. 245.

In many instances the testimony of the legatee would be pertinent and important in identifying the document as a last will. To illustrate: A father might execute a holographic will naming his eldest son testator and one of the chief beneficiaries. In the execution of such a will witnesses are not required. May not the eldest son produce the document and identify

the handwriting and vouch for the integrity of the document? To deny the right in such a case would, it seems to me, be a shocking denial of justice, and certainly a result never contemplated by our lawmakers in framing our statute. In the case of *Bookout v. Shannon*, 59 Miss. 378, a physician probated an open account for services rendered, and produced his original books of account as evidence of his claim. The books could not speak without being sufficiently identified and vouched for. The physician was permitted, not only to identify the books, but to testify orally as to the meaning of certain "hieroglyphics in which the account was kept." No one but the physician knew the key that would unlock or interpret these hieroglyphics, and the physician gave the key as well as identified the books. This case well supports the view that a statute should receive a reasonable construction. Let us take another illustration. The contestants of a will might and do frequently introduce testimony as to the declarations or statements made by the beneficiaries in a will, statements conceived to be against interest. Could not the beneficiaries take the stand and rebut this character of testimony? The court is here holding that they are unqualifiedly incompetent as witnesses for or against a will.

The *Whitehead-Kirk Case*, 104 Miss. 776, 61 So. 737, 62 So. 432, 51 L. R. A. (N. S.) 187, Ann. Cas. 1916A, 1051; is not controlling here. The testimony there condemned was held to be against the spirit, if not the letter, of the statute. The *Whitehead-Kirk Case* did not expressly overrule, and did not undertake to overrule, either one of the other cases which has expressly decided the point here at issue. On the contrary, the opinion (104 Miss., bottom of page 823 and top of page 824, 62 So. 432, 433 [51 L. R. A. (N. S.) 187, Ann. Cas., 1916A, 1051]) expressly said:

"It is also contended that former decisions of this court are in conflict with our decision of the present



case; but no such decision has been cited, and it is believed that none can be found."

This statement makes it clear that the court did not intend to overrule any previous decision of this court, but on the contrary, the court intended to say, and I think did say, that the decision in the *Whitehead-Kirk Case* was based upon a state of facts never before considered by this court. The previous decisions of the court were reviewed with the express purpose of demonstrating that the opinion then being delivered was in harmony with previous deliverances of our court. The only case that could possibly be held in conflict with the present opinion is that of *Cooper v. Bell*, 114 Miss. 766, 75 So. 767. A close examination of the opinion in *Cooper v. Bell* will show that a decision on the point now presented was expressly pretermitted. In the *Cooper-Bell Case* Mrs. Rutland occupied the same position which Mrs. Helm here occupies. She was a legatee, and was offered as a witness to prove that the testator was mentally sound at the time of the execution of the codicil. Under the issues there presented our court said that the rejection of her testimony "cannot be complained of by appellant for the reason that, whether right or wrong, it was in her favor and against appellee." In reference to *Whitehead v. Kirk*, *supra*, I make this further observation, that the primary object and result of the testimony there condemned tended to create a state of facts which would irrevocably fix the claim of the witness, a state of facts existing during the lifetime of the deceased. In this regard the opinion falls within the statutes enacted in many of the states and the decisions of many of the courts condemning the personal conversations or transactions of the witness with the deceased. In addition to the decisions of our court holding that a legatee is competent, many decisions of other courts are listed in the editor's note to *White-*

head v. Kirk, 51 L. R. A. (N. S.) 187. It is there shown that in the states of Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, and Virginia legatees and devisees are competent witnesses on the contest of a will, and the editor's note state that:

"So far as the form and phraseology of the statute are concerned, none of the other statutes appear so unfavorable as the Mississippi statute to the view adopted in *Whitehead v. Kirk*. . . . There seems to be no authority, outside of Mississippi, for the view that the right to succeed to a decedent's estate, as widow or heir, amounts to 'a claim' against the estate; much less that it amounts to a claim against the estate originating in the lifetime of the decedent."

I quote from these notes to emphasize the fact that our court went a long ways in *Whitehead v. Kirk*, and I for one am not in favor of enlarging or extending the force and effect of that opinion. To do so would class wills and the effort of legatees to uphold wills as something unlawful. It tends to characterize a will as *malum prohibitum* and to say to the beneficiary, "Touch not, handle not, the unclean thing." The innocent objects of many a bounty provided in wills frequently know nothing whatever about even the existence of the will until after the testator's death. The beneficiaries are frequently widows, children, and other relatives who are not consulted by the testator and who naturally resent imputations of fraud or improper influence, and who ought not be slandered in court without an opportunity to be heard.

In addition to the almost unbroken line of decisions listed in the L. R. A. notes, *supra*, it is stated in 40 Cyc. p. 2266:

"The statutes excluding evidence in actions by or against representatives or relating to transactions with a decedent are usually held not applicable in proceedings for the probate or contest of a will" and also in *Borland on Wills*, p. 69:

"The rule of the common law excluding devisees and other parties in interest and the modern statutes making them competent upon condition of relinquishing their claim under the will apply to attesting witnesses only, and not to devisees or legatees who might be called generally as witnesses in a will contest."

I think Mrs. Helm is a competent witness, that her testimony should not have been excluded, and that this is simply an additional reason why the case should be reversed and remanded for a new trial.

SMITH, C. J. (concurring). The facts sought to be proven by Mrs. Helm existed, if at all, prior to the death of the testatrix, and, if proven, will establish the validity of the will and consequently of the claim thereunder of the witness to the estate of the testatrix, so that the question here presented comes squarely within the rule announced in *Whitehead v. Kirk*, 104 Miss., at page 822, 61 So. 737, 62 So. 432, 51 L. R. A. (N. S.) 187 Ann. Cas. 1916A, 1051, and followed in *Cooper v. Bell*, 114 Miss. 766, 75 So. 767, which is that:

"Whenever a witness is offered for the purpose of proving any transaction, act, contract, admission, license, condition, etc. (whatever may be its exact nature), as 'a fact to be proven,' and proven as a fact existing or occurring prior to the death, and the proof of such fact as then existing or occurring is determinative of a claim or right of such witness to or in property of the deceased, and establishes such claim or right directly and finally, there the witness is testifying to establish his claim which originated during the lifetime of such deceased."

The cases of *Kelly v. Miller*, 39 Miss. 17; *Tucker v. Whitehead*, 59 Miss. 594; *Covington v. Frank*, 77 Miss. 606, 27 So. 1000; and *Jamison v. Jamison*, 92 Miss. 468, 46 So. 83, 945, here relied upon to support the competency of the witness, were all reviewed in *Whitehead v. Kirk*, and what was there said by the court in pointing out that they are not in conflict with the conclusion there reached applies with equal force here.

### WEST v. UNION NAVAL STORES Co.

[77 South. 609, Division B.]

1. MORTGAGES. *Deeds of trust. Assignment of debt. Recording. Code 1906, Section 2794.*

Under section 2794, Code 1906, providing for notation on the margin of the record of assignments of debts secured by mortgages or trust deeds, it is not required that assignments of recorded instruments shall be recorded on any particular page or pages of the record books, and where the original trust deed or the assignment of the same, the refusal of the original trustee to act, and the appointment of another trustee, all appear on the margin of the same page of the record, it was a sufficient compliance with the statute.

2. SAME.

Where the transfer of the record debt was in form a transfer of the deed of trust, yet looking through form to substance, it is clear that it was intended as a transfer of the debt, which carries with it the security and this appears of record as required by section 2794, Code 1906 (Hemingway's Code, section 2295), it was sufficient.

3. CORPORATIONS. *Assignments of deed of trust. Seal.*

In equity the failure to place the corporate seal on an assignment of a deed of trust by a corporation will not affect the title in the assignee.

4. CORPORATIONS. *Assignment of secured debt. Seal.*

The assignment, by a corporation of a debt secured by a deed of trust, is not required to be made under seal.

APPEAL from the chancery court of Wayne county.  
HON. W. M. DENNY, Chancellor.

Suit by John I. West, Jr., against the Union Naval Stores Company. From a decree for complainant, defendant appeals.

The facts are fully stated in the opinion of the court.

*Baskin & Wilbourne*, for appellant.

We have given the pages of the record in this brief, showing what transfers were made and where they were made, and the refusal of the original trustee to act, and the appointment of a substituted trustee. All of these are indisputably manifested by the record.

We are, therefore, at a loss to know, with these entries on the record where the deed of trust was recorded, how the chancellor could enter a decree that Gray as substituted trustee, had no right to sell said property, and therefore, the title of the appellant was not good.

Section 2794 of the Code of 1906, of Mississippi, provides that transfers of a record debt are to be noted on the record. Section 2795 of the Code of 1906, of Mississippi, provides that the assignment of debts is to be marked on the record. And section 2773 of the Code of 1906 of Mississippi provides that the substitution of trustees must appear of record.

When the court turns to page 64 of the record, it will find that the transfer is manifest of record, of date October 20, 1908, long prior to the taking of the appellee's deed of trust in this case. It will find also the refusal of the original trustee to act, and this is manifest by the record and that the appointment of A. H. Gray, as substituted trustee, is also manifest of record.

In another place, as above stated in this brief, the record manifests the transfer and assignment of the debt, refusal of the original trustee to act, and the ap-

pointment of a substituted trustee. Therefore, we submit that the above quoted sections of the statute have been literally complied with, and that the learned court below manifestly erred in making said decree.

The deed of trust of date the 13th of February, 1907, under which appellant claims title, one copy of which is found on pages 87 and 88 of the record, expressly provides that the beneficiary in the said deed of trust, its successors or assigns, may appoint another trustee. So that by the very terms of the deed of trust, the assignee Fagan had a right to appoint a substituted trustee, and the sale in this instance was made by said substituted trustee in strict accordance and conformity to the provisions of the said deed of trust and the law pertaining to foreclosure of the same.

It cannot be successfully contended, we submit that this appellant was in any wise estopped because of the filing of the bill by the Union Naval Stores Company to foreclose its second deed of trust of date November 5, 1910, which bill was filed in December, 1912, for the reason that there was no attack made on the deed of trust of date February 13, 1907, under which appellant claims, and, therefore, no adjudication was made which would estop the appellant from claiming title under the deed of trust of February 13, 1907.

The rule of *res adjudicata* or former recovery is confined to those cases where the parties to the suits are the same, the subject-matter the same, the identical point is directly in issue and judgment has been rendered on that point. *McCall v. Jones*, 72 Ala. 371.

Our own court, speaking through Judge CAMPBELL, in the case of *Hubbard v. Flynt*, 58 Miss. 266, as we submit, conclusively shows that there was no *res adjudicata* in this suit. As the question was not presented by the pleadings, and as Judge CAMPBELL says: "and, therefore, could not have been adjudicated." "The mere fact that it may have been introduced in the suit if the com-

plainant had chosen to do so, does not make such matters *res adjudicata*."

There is a distinction between this and the matter involved in the record in a former case, and which being so involved might have been litigated and decided, and which is held to be a matter adjudicated, because it might have been. *Davis v. Davis*, 65 Miss. 503.

We merely call the court's attention to this last question of *res adjudicata* and these authorities, because there is something said about it in the answer and cross-bill of the complainant on this subject, but we presume that the able counsel who represented the appellee, and who filed said pleadings, as well as the learned chancellor, conceived that there was nothing in this proposition, as the chancellor's decree is based on the fact that the appellant obtained no title through the deed of A. H. Gray, substituted trustee, and hence the reliance upon the right to a decree in the lower court was based solely on the failure of title because of the foreclosure proceeding of the substituted trustee.

In view of the undisputed facts, shown by this record, we respectfully submit that the decree of the lower court should be reversed, and a decree entered for appellants in this court.

*White & Ford*, for appellee.

The position of appellee in this case is that the deed of trust given it by John I. West, Sr., and wife, Nancy West, was perfectly valid and that the foreclosure proceeding in the chancery court resulting in the purchase of the land by appellee, confers on it a good and perfect title to the land. It must be admitted that the deed of trust given the Bank of Waynesboro, by the same grantors was prior in point of time to that given the Union Naval Stores Company, and it must be admitted further that the same was placed of record in the land records of Wayne county, prior to the deed

of trust to the Union Naval Stores Company. We insist, however, that the assignment of the deed of trust by the Bank of Waynesboro to R. W. Fagan & Company, the refusal of the trustee to act, the appointment of a substituted trustee, and the sale by him were absolutely void, and therefore appellant would acquire no title under the purchase, at the substituted trustee's sale. No question is raised as to the validity of the deed of trust given the Union Naval Stores Company, or the regularity of the proceeding by which it was foreclosed, nor as to appellant's purchase at the commissioner's sale. We shall confine our presentation of this matter therefore to the transactions affecting the deed of trust to the Bank of Waynesboro.

We shall deal first with the transfer of the deed of trust to R. W. Fagan & Company by E. F. Ballard.

We submit that this instrument has no symptom of a legal document. It will be noted that no consideration for the transfer is recited in the instrument; the instrument itself does not identify what is to be transferred as a matter of fact, the paper is not signed, and although it purports to be the act of the Bank of Waynesboro, a corporation, the corporate seal is not attached. Furthermore the court will observe that the acknowledgment is entirely irregular, in that the grantor merely purports to have acknowledged that he signed and delivered the transfer. Nothing is said as to it being the act of the corporation, which E. F. Ballard was supposed to be representing as vice-president. This paper was certainly not entitled to be recorded among the land records of Wayne county under the law. The court will bear in mind further that this writing appears on the back of the original deed of trust, and is not written on a separate piece of paper. It will be noted further that the body of the transfer appears written in long hand on the back of the original deed of trust, but the acknowledgment is on a printed form written on a separate slip of paper and attached



merely to the back of the original deed of trust where various other matters appear. We do not think it would be seriously contended that such a document would be sufficient to transfer the legal title to the deed of trust, and certainly it is not entitled to be recorded.

We invite the attention of the court to chapter 74 of the Code of 1906, and especially section 2793 thereof.

Now, it will be noted in this connection, that the acknowledgment was insufficient in that it was not attached to the instrument which purported to make the transfer at all but was written on a slip of paper attached to the original deed of trust, on the back of which the body of the transfer assignment was written. It will be noted further that the acknowledgment is not in the form provided by section 2799 of the Code. We think therefore, that this document was not entitled to be recorded, and after being recorded did not constitute notice to any encumbrancer or creditor for a valuable consideration. Under the provisions of section 2794, of the Code, any assignment of a mortgage or deed of trust, or other lien of record, shall be made by the creditor, by entering on the margin of the record the fact of the assignment and in default of making such entry, any satisfaction or cancellation of the lien or instrument evidencing it entered by the original creditor, shall release the same as to subsequent creditors and purchasers, for value without notice unless the assignment be by writing duly acknowledged and filed for record. Under the provisions of this section, one of two things is necessary to-wit: Either there must be a separate instrument of assignment validly executed and placed of record, or the fact of the assignment must be duly entered on the margin of the record, where the original deed of trust or mortgage is recorded. Neither of these things was done. The clerk merely undertook to record on the margin of the record, the endorsement on the back of the original deed of trust.

We think that the instrument of assignment was further insufficient and illegal in that it did not carry nor purport to contain the corporate seal of the Bank of Waynesboro. Under the provisions of section 2766, of the Code, a corporation or body politic may convey land by and under the corporate seal and the signature of an officer, and such officer signing the same may acknowledge the execution of the deed, or proof thereof may be made as in other cases. Under the law of Mississippi the corporate seal is essential to the validity of a deed by a corporation. This was held by the recent case of *Littelle v. Creek Lumber Company*, 54 So. 841. This case held squarely that the absence of the corporate seal to a deed affecting land by a corporation would make it invalid so far as conveying the title is concerned.

We come next to the appointment of the substituted trustee by R. W. Fagan & Company.

It will be observed that the records do not show when this writing was actually recorded by the clerk, although it appears to have been executed by R. W. Fagan & Company on January 17, 1910. We submit that this writing is insufficient to appoint a substituted trustee for many reasons.

The instrument does not recite for what purpose A. H. Gray was substituted a trustee, nor for what instrument or deed of trust. The court will observe further that the writing does not appear to have been acknowledged by any one, and therefore it was not entitled to be recorded. Section 2773 of the Code of 1906.

We do not find that this court has ever construed section 2773 of the Code in reference to the manner in which substitution should appear of record. We find, however, a number of authorities on chapter 96, of the Laws of 1896. Chapter 96 was often construed by this court and we cite the following cases as to the necessity of the act of substitution being properly of record, as follows: *Provine v. Thornton*, 92 Miss. 395; *Polk v. Dale*,

93 Miss. 667; *White v. Jenkins*, 79 Miss. 57; *Shipp v. New South B. & L. Association*, 81 Miss. 17.

It will be noted that section 2773, of the Code of 1906, which must be the criterion of validity here, is radically different from chapter 96 of the Laws of 1896. Section 2773 of the Code of 1906, was certainly not followed by the parties in the form of substitution shown by this record.

We contend further that R. W. Fagan & Company had no right to appoint a substituted trustee. In the case of *Alliance Trust Company*, 84 Miss. 319, it was held that an attorney-in-fact for a beneficiary in a deed of trust, had no authority to appoint a substituted trustee, and that the sale made by such substituted trustee was void. The same was held in the case of *Mortgage Company v. Butler*, 99 Miss. 64; *Provine v. Thornton*, 92 Miss. 365.

As we have endeavored to show, the foreclosure of the deed of trust to the Bank of Waynesboro was void for many reasons, which we have attempted to discuss in this brief. Manifestly, if the foreclosure was void, the Union Naval Stores Company, appellee herein were entitled to the relief sought in their cross-bill.

It is true that the appellant undertook to show an assignment of the deed of trust, a refusal of the trustee to act, and a substitution of a new trustee, but we submit that these efforts were legally unsuccessful.

In conclusion, we respectfully submit that the foreclosure of the Bank of Waynesboro deed of trust by A. H. Gray, substituted trustee, was palpably void, and that this appeal should be affirmed.

COOK, P. J., delivered the opinion of the court.

The appellant filed in the chancery court of Wayne county his bill of complaint, in which he sought the aid of the court to confirm and quiet his title to certain lands described in the bill. Various parties were made

parties defendant, but this appeal concerns the Union Naval Stores Company alone. The title of appellant to the land in controversy rests and depends upon the validity of a certain trustee's deed, which deed, in turn depends upon the validity of the transfer of a deed of trust executed by John I. West, Sr., and his wife, to secure an indebtedness due by Mr. West to the Bank of Waynesboro, and the steps precedent to the foreclosure of the deed of trust.

First, the Union Naval Stores Company claimed that it was a purchaser for value, without notice, of the land described in the bill of complaint, and made its answer a cross-bill, praying for a confirmation of its title to the land. Upon final hearing the court dismissed appellant's bill and confirmed the alleged title of the Naval Stores Company to the land. There are many details leading up to the final decree, but we have decided to cut out everything except such facts as are necessary to a proper understanding of our conclusions.

Appellees challenged the legality of the transfer of the deed of trust executed by John I. West, Sr., to the Bank of Waynesboro. It seems that this assignment was made by the vice president of the bank, acknowledged by him and recorded in the records of Wayne county, by writing the same on the margin of the record of the deed of trust. In other words, the assignment was not recorded as a separate instrument, but was merely written on the margin of the record of the deed of trust itself. It further appears that the trustee named in the deed of trust refused to act and his refusal was written in the back of the deed of trust, and also on the margin of the record of the deed of trust. It also appears that the assignee of the deed of trust appointed another trustee, and this appointment appears of record in the same way as does the refusal of the original trustee to act.

Appellee contends here that the assignment of the deed of trust by the Bank of Waynesboro was void, because the corporate seal of the bank was not attached to the assignment. To support this contention our attention is directed to section 2793, Code of 1906 (Section 2294, Hemingway's Code) which reads:

"Acknowledgment or Proof Necessary to Recording.—A written instrument of or concerning the sale of lands, whether the same be made for passing an estate of freehold or inheritance, or for a term of years, or for any other purpose, except in cases specially provided for by law, or any writing conveying personal estate, shall not be admitted to record in the clerk's office unless the execution thereof be first acknowledged or proved, and the acknowledgment or proof duly certified by an officer competent to take the same in the manner directed by this chapter and any such instrument which is admitted to record without such acknowledgment or proof shall not be notice to creditors or subsequent purchasers for a valuable consideration."

Query—Was this so-called assignment of the deed of trust, in fact, an assignment of the deed of trust, or was it merely an assignment of the debt secured thereby? Be that as it may, we find ourselves unable to approve the reasoning of learned counsel for appellee. As we understand counsel, they contend that the assignment of the trust deed should be recorded as other instruments conveying title are recorded—that is to say, as a separate instrument—and that the record here being made on the record of the original deed of trust is utterly void.

The object and purpose of recording such instruments is to give notice of the state of the title to all persons interested or dealing with the thing conveyed, and it seems to us that one interested in the title to the land involved in this litigation would naturally turn to the record of the first incumbrance upon the same,

and finding written on the record there notice of the assignment of the same he would be put upon notice of the facts. The statute does not require that assignments of recorded instruments shall be recorded on any particular page or pages of the record books.

In this case, however, the original trust deed, the assignment of same, the refusal of the original trustee to act, and the appointment of another trustee, all appear on the same page of the record, thus affording an easy way for interested persons to ascertain the state of the title. The transfer of the record debt in this case was, in form, perhaps, a transfer of the deed of trust, yet looking through form to substance, it is quite clear that it was intended as a transfer of the debt, which carried with it the security, and this appears of record as required by section 2794, Code of 1906.

We do not believe that the failure to place the corporate seal on the assignment of the deed of trust affects the title. *Littelle v. Creek Lumber Co.*, 99 Miss. 241, 54 So. 841, is not in point. The suit in that case was by ejectment, and a careful reading of that case will show that the principle there announced does not apply to this case. This is a proceeding in equity, and technical points raised in the *Littelle Case* will not avail here. *McIver v. Abernathy*, 66 Miss. 83, 5 So. 519.

The assignment by a corporation of a debt secured by a deed of trust is not required to be made under seal. The debt to a banking corporation is usually evidenced by a note, and an assignment of the note does not require a seal. A corporation, of course, cannot convey real estate without affixing its seal to the conveyance. In this case no real estate was conveyed by the corporation; the conveyance was made by the trustee. So we conclude that the learned chancellor erred in refusing to confirm the title of appellant, and therefore he also erred in confirming the alleged title of appellee.

We see no reason to remand this case; it appearing that there is no dispute about the facts, the contestants only disagreeing as to the legal consequence of the known facts. The decree of the chancellor is set aside, and a decree will be entered here, confirming and quieting the title of appellant to the land described in the bill of complaint.

*Reversed, and decree here.*

LIVERPOOL & LONDON & GLOBE INS. CO. v. HINTON.

[77 South. 652.]

1. **INSURANCE. *Renewal contracts. Presumptions.***

A court of equity will compel the issuance and delivery of an insurance policy after loss, where there has been a valid agreement for one before the loss and will enforce its payment as if made in advance and this will be done though the contract was by parol.

2. **SAME.**

Where an authorized agent of an insurance company orally agreed to renew a policy, but nothing was said about any change in its terms or the amount of the premium the terms of the new policy will be presumed to be the same as those in the old policy.

3. **INSURANCE. *Renewal. Terms.***

Where there had been a change in the partners of an insurance agency, since the issuance of an original policy—but the agent who actually wrote the policy continued as a member of the firm in such case the insurance agency was fully advised as to the old policy when it agreed to a renewal thereof and such renewal policy in the absence of agreement to the contrary will be without change of conditions and upon the same terms as the original policy.

4. **INSURANCE. *Agents. Authority. Acts of company.***

An agent who has authority to issue policies of fire insurance stands in the stead of the company, and his acts and declarations with reference thereto are the acts and declarations of the company, and the company is bound thereby.

5. *INSURANCE. Renewals. Premiums. Time due. Waiver.*

Where an insurance agency had not required advanced payments of premiums on two policies taken out previously by plaintiff, and he agreed orally for a renewal of one of them with a member of the agency who failed to demand payment of the premium at the time, and it was the custom of such agency to keep books and charge premiums for insurance and collect them when they desired. In such case by not demanding the premium when they agreed to renew the policy and by the course of dealing between the agency and plaintiff, the right to demand the premium before the issuance of the policy was waived.

6. *EVIDENCE. Admissibility. Telephone conversations.*

In a suit to compel the issuance of a renewal policy in accordance with the terms of an alleged oral contract, the evidence of witnesses who heard what plaintiff said in a telephone conversation in regard to such renewal was competent.

7. *INSURANCE. Renewals. Contracts. Execution.*

A contract for the renewal of a fire policy becomes complete when an authorized agent of the insurer agrees to such renewal.

8. *INSURANCE. Renewals. Evidence. Materiality.*

Where one of the partners in an insurance agency knew of and acquiesced in a renewal by an employe of a fire policy, it was not material what conversations took place during the fire or afterwards, when plaintiff and defendant were looking for the insurance policy.

APPEAL from the chancery court of Jasper county.

HON. G. C. TANN, Chancellor.

Bill by S. M. Hinton against the Liverpool & London & Globe Insurance Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*M. Laurin & Armistead* and *T. G. Birchett*, for appellant.

We will answer the appellee's brief by its headings. Appellee argues that the evidence is sufficient to show that the appellant Insurance Company made an agreement to extend appellant's insurance.



The counsel for appellee say that the essentials of the oral contract to insure are not necessary because they contend that this was an agreement to renew an existing policy. We repeat that the evidence shows nowhere that there was any agreement to renew. Neither Hinton, nor the Cheeks ever testified that Hinton ever identified himself in his telephone conversation to Reid. Reid said he never talked to Hinton. If Reid never understood he talked to Hinton, how could he have ever agreed to renew Hinton's policy? Their minds to create a contract must agree on that.

Surely, it cannot be contended that one can make a binding contract with a person, whom he did not know he was talking to. Appellee cannot dispute away this necessary element of understanding. Hinton remembered he knew Reid's voice, when he was again put on the stand, after he had already been examined and cross-examined. Reid testified he did not know Hinton's voice. The authorities cited in this connection by appellee are based on the assumption that Reid had agreed upon the renewal of the policy. This we contend that the proof does not show, and ask the court to read the record and compare Reid's testimony with that of Hinton and the Cheeks. Nowhere will it appear, that in the telephone conversation did Hinton make himself known to Reid, or Reid ever understand he ever talked to Hinton.

As to Reid's authority to make the promise to renew appellee's policy. The agents authorized by the appellant were Denison and Blankenship. Reid was a clerk in their office. He testified that Blankenship had instructed him not to renew the policy. But the record does not show that Reid ever agreed to renew the policy, or understood that same was renewed.

On page 15 of appellee's brief we find: "The agency did issue the original policy to appellee."

This is a departure from the record. The Jasper county insurance agency was composed of Joiner and Denison when the policy was issued. Joiner withdrew

and that agency was dissolved and a new one was formed which was in existence when the supposed renewal was claimed to be made. Therefore the insurance firm of Denison and Blankenship did not issue the 1910 policy, the only fire policy ever issued.

"The effect of the appellant's failure to pay the premium." This, it is admitted, was not paid. Appellee undertakes to claim a course of dealing, which warrants perpetual credit. The first and only fire policy was issued by Denison, who delivered it to Hinton and collected the premium from him by check.

The only other policy was the tornado policy issued to Hinton and kept at the bank; the only policy or paper kept at the bank. On record pages 57 and 58, we find Blankenship asking for the premium promptly, and Hinton paying same in cash and the premium was asked for and paid in cash, at a time, after Hinton claimed his fire policy was in force by agreement, Hinton's own testimony.

Does the prompt settlement of these two premiums show an extensive and long practise of credit? Blankenship and Denison both testified that they had no authority to charge any bank account with premiums and that was not the course of business. These transactions do not show that Blankenship and Denison handled premiums like merchants' accounts.

"As to the admission of the telephone conversation between the appellee and Reid." This we have fully discussed in our first brief. But again we say, nowhere does it appear that Hinton ever made himself known to Reid or Reid knew he was talking to Hinton, if he so talked which he denied. We again reiterate that there could be no renewal of Hinton's insurance by Reid unless Reid knew he was talking to Hinton. Hinton says he said: "Is that you, Reid?" He never made himself known to Reid, and neither he, Hinton, nor the Cheeks said he did so.

We submit that the evidence does not show a condition of facts to warrant the chancellor's finding.

We again respectfully submit, that this case should be reversed and judgment rendered here for the appellant.

*J. T. Brown and J. N. Flowers*, for appellee.

The evidence is sufficient to show that appellant Insurance Company, through its duly authorized agents, made an agreement to renew or to extend appellee's insurance.

The testimony of the appellee and of the appellant shows that appellee had only one policy of insurance and that a policy of insurance on the house and personal property issued by the appellant the Liverpool & London & Globe Insurance Company. And the testimony of the appellee is that it was this policy that the agent of appellee agreed to renew. There was no agreement about any additional insurance, or a different class of insurance or about a new policy in some other or different company. It was merely an agreement between Reid, the insurance agent, and appellee, to the effect that appellee's policy of insurance which expired on that particular day would be renewed.

Here we are dealing with a promise to renew an already existing policy. Its terms, character, benefits and obligations have already been agreed on and the controversy arises over an agreement or promise to renew this policy at the expiration of the period for which it was written.

"Here there was simply an agreement to renew an existing policy. The agreement would naturally mean that a similar policy was to be issued on May 6th, on the same tobacco insuring it for six hundred dollars for three months from that date." *Georgia Home Insurance Company v. Kelley*, 113 S. W. (Ky.) 882.

The Kentucky court in the above case had under consideration a controversy on all-fours with the case at bar. *Mallette v. British American Insurance Company*, 91 Md. 471, 46 Atl. 1005; *Abel v. Phoenix Insurance Company*, 62 N. Y. Sup. 218; *American Central Insurance Company v. Hardin*, 148 Ky. 246, 146 S. W. 418; *King v. Kikla Insurance Company*, 58 Wis. 408, 17 N. W. 297; *Gold v. Insurance Company*, 73 Cal. 216, 14 Pac. 786; *Home Insurance Company v. Adler*, 71 Ala. 516; *Hawthorn v. German Alliance Company*, 181 Ill. App. 88; (An order to renew given over the telephone) *Worth v. Insurance Company*, 64 Mo. App. 583; *Post v. Aetna Insurance Co.*, 43 Bach (N. Y.) 351; *Baldwin v. Phoenix Insurance Company*, 107 Ky. 356, 54 S. W. 13, 92 Am. St. Rep. 362; *Commercial Insurance Company v. Morris*, 105 Ala. 498, 18 So. 34; 131 Ala. 711; 71 Ala. 516;—Ala. 163, 9 How. 405; 89 Tenn. 1, 14. S. W. 317.

In the case at bar we are not concerned with the proposition of whether or not there exists the essential elements to support a contract of insurance or to insure, or as it is often called, "an oral contract to insure." We are dealing with a case involving the agreement of appellant's agents to renew a policy of insurance.

"The very request to renew a policy implies that the new policy shall be exactly like and similar to the old." *Mallette v. Insurance Company, supra*.

When the agent agreed to renew the policy it placed the parties in the same attitude as though there had been a valid and binding contract to insure, upon the terms and conditions set forth in the old policy. When Reid agreed to renew appellee's policy, or promised to do so, it placed the insurance company in the same position it would have occupied had there been a valid agreement to insure and for the issuance of a policy on the exact same terms and conditions as to time,

amount of insurance, and property, as the old policy and this court has held that:

"It is well settled that a court of equity will compel the issuance and delivery of an insurance policy after loss where there has been a valid agreement for one before the loss and will enforce payment of it, as if made in advance." *Franklin Fire Ins. Co. v. Taylor*, 52 Miss. 441; *Abel v. Insurance Co.*, 62 N. Y. Supp. 218-219, 42 App. Div. 81.

"As to Reid's authority to make the promise to renew appellee's policy of Insurance." The Jasper county insurance agency was managed by Reid. He kept the books, made contracts of insurance, issued policies, signed policies and collected premiums.

"The powers of insurance agents to bind their companies are varied by the character of the functions they are employed to perform. An agent clothed with the authority to make contracts of insurance or to issue policies stands in the stead of the company to the assured. His acts and declarations in reference to such business are the acts and declarations of the company. The company is bound, not only by notice to such agent, but by anything said or done by him in relation to the contract or risk, either before or after the contract is made." *Rivara v. Insurance Company*, 62 Miss. 720; *London, etc., Insurance Company v. Sheffy*, 16 So. (Miss.) 307; *Insurance Company v. Bowdre*, 7 So. (Miss.) 596; *Home Insurance Company of New York v. Gibson*, 17 So. (Miss.) 13; *Insurance Company v. Randal*, 33 So. (Miss.) 500; *Insurance Company v. Bank*, 18 So. (Miss.) 931.

The effect of appellee's failure to pay the premium. Another feature of the case emphasized by counsel for appellant is the non-payment of the premium. Mr. Hinton would not testify that he had actually paid it. He was not certain but he did state that he had authorized the charging of the premium to his account at the

116 Miss.]

Brief for appellee.

bank. The men who ran the insurance agency also ran the bank. Denison was president, Blankenship cashier, and Reid assistant cashier of the Bank of Bay Springs. These same gentlemen owned and ran the Jasper county insurance agency. One building and one office housed both enterprises. Hinton kept his money in the bank. The agents of appellant in their testimony admit that Hinton was solvent, and admit his ability to pay. They admit their custom of giving credit for insurance premiums and presenting bills for past due premium accounts. Appellee stated that in the light of his instructions to charge the premium to his account and of his knowledge of their custom to present bills when payment was desired, the payment of the premium never crossed his mind. He knew these insurance agents did business just as all such agencies do; that is, they issued policies without the cash payment of premiums and presented bills when payment was desired. No bill was ever presented to him for the renewed policy and he naturally thought that it had been charged to his account at the bank. The agents admit no demand and refusal to pay. The payment of the premium was not essential to the validity of the new policy in the light of these circumstances. *Baldwin v. Phoenix Insurance Company*, 107 Ky. 356, 54 S. W. 13; *Post v. Aetna Insurance Company*, 43 Bach. (N. Y.) 35; *Hawthorn v. German Alliance Company*, 181 Ill. App. 88; *Briggs v. Collins*, 1915-A; L. R. A. (N. S.) 686.

It overwhelmingly appears that the custom of the insurance agency was to handle its accounts just like a merchant handles his. This custom was well known to appellee. He had a right to rely on this custom and to act with reference to it. See the cases of *Worth v. Insurance Company*, 64 Mo. App. 583; *American Insurance Company v. Hardin*, 146, S. W. (Ky.) 418; *King v. Insurance Company*, 17 N. W. (Wis.) 297; *Gold v.*

*Sun Insurance Company*, 81 N. W. (S. D.) 426; *Brown v. Insurance Company*, 108 Miss. 824; Elliott on Contracts, ch. 5, secs. 4133-4134.

As to the admission of the telephone conversation between appellee and Reid. Appellee testified that he went to the home of Mr. Cheek and asked permission to use the telephone in his house. In the presence of Mr. and Mrs. Cheek he says he called the bank and Mr. Reid answered the telephone. In the conversation that followed a contract of renewal was then and there consummated.

Mr. and Mrs. Cheek were both sworn and stated that they remembered the incident and heard appellee tell Reid that his insurance expired that day and that he wanted it renewed. They then heard him say: "I thought you would, but I wanted to make certain of it."

As stated by this court in the recent case of *St. Paul Fire & Marine Ins. Co. v. McQuaid*, 75, So. 257: "As to the law touching conversations over telephones: We think the law is well settled that such conversations are admissible in evidence. The fact that the voice at the telephone is not identified does not render the conversation inadmissible. The weight to be given such evidence is largely left to the jury, or to the chancellor, when the case is tried without a jury." *Kent v. Cobb*, 133 Miss. 425; *McCarthy v. Peach*, 186 Mass. 67, 70 N. E. 1029; 1 Am. Ann. Cas. 801.

We submit that court was not only right in admitting the telephone conversation but was also right in permitting Mr. and Mrs. Cheek to tell what they heard of it. A contract of renewal or to renew could be made over the telephone just as well as it could be made any other way. The whole question, therefore, resolves itself into one of fact to be passed upon by the chancellor before whom the case was tried.

Much attention is devoted by counsel for appellant to the alleged wrongful admission of the testimony offered by the complainant, appellee here, as to the statements

of the appellant's agents subsequent to the telephone conversation and on the night of the fire. We do not contend and did not contend below, that these statements were admissible against the London & Liverpool & Globe Insurance Company as admissions of the corporation.

It will be noted, however, that these agents were parties defendant to this suit and certainly their admissions as against themselves were competent. *Commercial Fire Insurance Company v. Morris*, 18 So. (Ala.)—. We submit that there is nothing left for this court but to affirm the case.

SYKES, J., delivered the opinion of the court.

The appellee, S. M. Hinton, filed a bill in the chancery court of Jasper county against the appellant insurance company, L. L. Denison and Clyde Blankenship. The bill alleges that complainant owned a one-story frame building, which was his residence in the town of Bay Springs; that in January, 1910, he procured from the Jasper County Insurance Agency, a partnership composed of the defendants Denson and Blankenship, an insurance policy in the Liverpool & London & Globe Insurance Company to the extent of one thousand dollars insurance upon his dwelling and five hundred dollars insurance upon his household furniture, the insurance being for three years and expiring on January 21, 1913; that on the 21st day of January, 1913, the complainant communicated with the agents of the insurance company at their office in the Bank of Bay Springs, and reminded them that this insurance policy had expired, and told them that he wanted the policy renewed, and that these agents assured him that it would be renewed, and his property would continue to be protected by insurance; that at a later period in discussing additional insurance with them, they again told him that the one thousand five hundred dollar policy had been renewed; that he relied upon the agreements to renew and the



representations that his policy had in fact been renewed; that on June 18, 1914, his house was burned, and his household goods were damaged to the extent of two hundred dollars, making his total loss one thousand two hundred dollars. Complainant alleges that the renewal policy should have been issued to him as agreed upon between him and the agents of the company, and that it should be treated as having been issued; that the insurance company denied liability. Complainant prays in the bill that the defendant insurance company be required to issue him a policy renewing the contract which he had up until the 21st day of January, 1913; that the policy be issued, if necessary, as of that date for the term of three years; that the insurance company be held liable for the loss under the contract, or that, if the insurance company be held not liable, then that the said Denison and Blankenship be held liable for violating their contract with complainant to renew the policy. The first insurance policy is made an exhibit to the bill. It was issued for a term of three years. The premium therefor was thirty-six dollars. The answer of the insurance company admitted the issuance of the first policy, but denied that any renewal was ever agreed upon between its agents and complainant. The answer, in short, denies that any new policy was ever issued, or was ever agreed to be issued, to the complainant; denies that the agents did anything with reference to a renewal to bind the insurance company. The defendants Denison and Blankenship adopted the answer of the insurance company as theirs. The testimony introduced at the trial for the complainant showed the issuance of the first policy, the fire, and that his loss amounted to one thousand two hundred dollars in said fire. The complainant testified that on the evening of January 21, 1913, he went to the house of a neighbor, a Mr. Cheek, and with Mr. Cheek's permission used his telephone; that he telephoned the bank, and was answered by Mr. Reid, the assistant cashier of the bank. He stated that he told Mr. Reid

that his policy expired that day, and that he wanted him to renew it; that he did not want to be without insurance; that Mr. Reid assured him that he would do so. He further testified that Mr. Denison and Blankenship, who were the president and cashier, respectively, of the bank, were the insurance agents, and operated under the name of the Jasper County Insurance Agency; that he was assured by Mr. Reid that he would not let his policy run out of date. It was shown by the testimony of Mr. Reid that the insurance business was handled in the bank, and that he had the authority and did as a matter of fact write the policies and renewals for the Jasper County Agency. The complainant, Mr. Hinton, further testified that, after the conversation with Mr. Reid over the telephone about renewing his insurance, and before the fire occurred, he had a conversation with Mr. Blankenship in the bank, and asked him if he had attended to his insurance, and also asked about taking out five hundred dollars additional insurance. He was informed in this conversation with Mr. Blankenship that he had, in effect, at that time one thousand five hundred dollars insurance, and he would be allowed to take out five hundred dollars more; that this conversation occurred about two months before the fire. The testimony of the defendants contradicted that of the complainant upon all material issues. The thirty-six dollar premium for the renewal policy was never paid by Mr. Hinton, and the policy was never delivered to him. Mr. Hinton stated that he kept some of his papers in the bank, among others a tornado policy, and that he meant to leave this renewal policy also with the bank; that no bill had ever been presented to him for the payment of the premium; that he would have paid it on the presentation of the bill. The testimony further shows that the first policy was issued to him on January 21, 1910, and that the premium on that policy was paid on February 3, 1910, a few weeks after it was issued. The testimony of one of the defendants shows that they

kept insurance accounts just as a merchant keeps accounts, and presented their bills for insurance when they were due. Since they deny that this policy was in force, there was, of course, no bill presented for the premium. The testimony is uncontradicted that Mr. Reid, the assistant cashier of the bank, had the authority to issue and renew insurance policies. The chancellor rendered a decree in favor of the complainant against the insurance company, ordering it to issue the policy prayed for in the bill, decreed that the amount due complainant under said policy was one thousand two hundred dollars, and credited the insurance company with the premium of thirty-six dollars. The bill was dismissed as to the defendants Denison and Blankenship.

The first contention of the appellant is that the evidence was insufficient to show that the appellant company, or any agent authorized to act for it, made any agreement to extend the insurance; that there was not a meeting of the minds of the insurer and the insured to consummate the agreement. The testimony in the record shows that Mr. Reid, with whom appellee had his telephonic conversation, was authorized to renew policies of insurance and to write them and sign the name of the Jasper County Insurance Agency. This testimony shows that he agreed to this renewal. The testimony of Mr. Hinton is also to the effect that Mr. Blankenship, one of the partners of this insurance agency, told him that this insurance was in effect. That there can be an oral contract to renew insurance is unquestioned. In this case the contract of renewal agreed upon was that the new policy to be issued would be for the same term of years as the old policy, viz. three years, would be for the same amount, viz. one thousand dollars on the dwelling and five hundred dollars on the furniture, and would be for the same premium, viz. thirty-six dollars. There was nothing said about any change in the terms of the policy or the

amount of premium to be paid therefor in the contract of agreement of renewal. This being true, it follows that the terms of the new policy were to be the same as those contained in the old policy. This is demonstrated by the below cited authorities:

"Here there was simply an agreement to renew an existing policy. The agreement would naturally mean that a similar policy was to be issued on May 6th on the same tobacco, insuring it for six hundred dollars for three months from that time." *Georgia Home Ins. Co. v. Kelley*, 113 S. W. (Ky.) 882.

"As to the objection that nothing was said as to the terms and conditions of renewal, we hold that, where there is an agreement for renewal of a policy, the insured is justified in assuming that the premium, and all the terms and conditions of the renewal, will be the same as those of the original, unless he has notice of some proposed change. This would hardly seem to need authority." *Mallette v. British American Ins. Co.*, 91 Md. 471, 46 Atl. 1005.

"According to his statement, the agreement then was to 'renew the insurance for one year.' His last insurance, had through this agent, was with the defendant company, and, by force of the term 'renew,' the company, as well as the property to be insured, and the terms of the policy, was sufficiently designated and agreed upon." *Abel v. Phoenix Ins. Co.*, 47 App. Div. 81, 62 N. Y. Supp. 218.

"Where, however, there exists a contract of insurance, . . . and there is an agreement between the parties to renew the policy, and no change is suggested or agreed upon, it will be implied that the renewal contract included and adopts all the provisions of the existing contract of insurance. Such a contract is complete in all respects, and upon failure to comply with the agreement, the party offending may be compelled, by bill in equity, specifically to perform the

agreement, or held liable in a court of law for damage resulting from a breach of the agreement (*Mobile Marine Dock and Mut. Ins. Co. v. McMillan & Sons*, 31 Ala. 711; *Home Ins. Co. v. Adler*, 71 Ala. 516; *Ala. Gold Life Ins. Co. v. Mayes*, 61 Ala. 163, 9 How. 405; *Lancaster Mills v. Merchants' Ins. Co.*, 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586), . . . and where the agreement was to renew an existing contract of insurance, it was proper and necessary to admit in evidence such existing contract of insurance." *Commercial Ins. Co. v. Morris*, 105 Ala. 498, 18 So. 34.

"The very request to renew a policy implies that the new policy shall be exactly like and similar to the old." *Mallette v. Ins. Co.*, *supra*.

It has been decided by this court that a court of equity will compel the issuance and delivery of an insurance policy after loss where there has been a valid agreement for the issuance of same before loss:

"It is well settled that a court of equity will compel the issuance and delivery of an insurance policy after a loss, where there has been a valid agreement for one before the loss, and will enforce payment of it, as if made in advance. . . . This will be done where the contract was by parol, and even where the charter of the insurance company requires all policies to be in writing." *Franklin Fire Ins. Co. v. Taylor*, 52 Miss. 441.

The appellant also contends that there has been a change in one of the partners of the insurance agency since the issuance of the first policy, which is true. The testimony, however, shows that the agents of the company at the time they agreed to renew the same were fully informed as to the terms and conditions of the old policy. In fact, the agent who actually wrote the policy continued to be a member of the firm. It, therefore, follows that the insurance agency was fully ad-

vised as to the old policy when they agreed to a renewal of the same.

"Where plaintiff's last insurance was had with the defendant insurance company through the same agent, the word 'renew,' in an oral contract with such agent to renew the insurance, sufficiently designates the company, as well as the property to be insured, and the terms of the policy." *Abel v. Ins. Co.*, 47 App. Div. 81, 62 N. Y. Supp. 218.

This court has uniformly held that an agent who has authority to issue policies of fire insurance stands in the stead of the company, and that his acts and declarations with reference thereto are the acts and declarations of the company, and that the company is bound thereby.

"The powers of insurance agents to bind their companies are varied by the character of the functions they are employed to perform. . . . An . . . agent clothed with the authority to make contracts of insurance or to issue policies stands in the stead of the company to the assured. His acts and declarations in reference to such business are the acts and declarations of the company. The company is bound, not only by notice to such agent, but by anything said or done by him in relation to the contract or risk, either before or after the contract is made." *Rivara v. Ins. Co.*, 62 Miss. 720.

"The naked inquiry, then, is, Could the agent of the insurer waive the condition of the contract requiring consent for additional insurance to be made in writing indorsed on the policy? Or, to put it otherwise, Is the insurer estopped from claiming a forfeiture by the acts and conduct of its agents? . . . They represented and stood for the company. They received applications; they issued policies; they collected premiums; they received notice of other insurance, and gave consent thereto—in general, they did for the company whatever it

could do in the matter of making and continuing contracts of insurance. The company, being an artificial creature, could only act through human agencies, and what those agents did in this case, as indicated above, the company itself may be said to have done." *London etc., Ins. Co. v. Sheffy*, 71 Miss. 919, 16 So. 307. See, also, *Ins. Co. v. Wylie*, 110 Miss. 681, 70 So. 835.

It is further contended by the appellant that before the renewal contract became valid or enforceable it was necessary for the insured to pay the premium on said policy. The record in the case shows that the appellee did not pay the premium on the first policy until after it had been issued several weeks. It also shows that the same insurance agency did not require that he pay the premium on the tornado insurance policy which he carried with this agency at the time of its issuance, but that his attention was called to the premium being due one day when he was in the bank, and that he paid the same in cash. The testimony further shows that the insurance agency kept books and charged premiums for insurance, and collected them whenever they so desired. By not demanding the premium when they agreed to renew the policy, and by the course of dealing between this agency and appellee, the right to demand the premium before the issuance of the policy was waived. The testimony in this case shows that the appellee did a banking business with the bank of which the members of the insurance agency were respectively president and cashier, and that the insurance matters were handled by the officers of the bank.

"The actual payment of the premium before the risk attaches is not necessary unless such payment is made a condition precedent by the terms of the contract. This is not ordinarily done in cases of marine and fire insurance, but is customary in cases of life insurance. . . . The premium may be paid to the company or its duly authorized agent. Presumably it is payable in

cash, but if credit is given, it is 'equally as effective as cash. If there is no provision making the payment of the premium a condition precedent, it seems that the agent who negotiated the insurance may give credit for the premiums.'" Elliott on Contracts, vol. 5, secs. 4133, 4134.

See, also, *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Hawthorn v. Alliance Co.*, 181 Ill. App. 88; *Baldwin v. Phoenix Ins. Co.*, 107 Ky. 356, 54 S. W. 13, 92 Am. St. Rep. 362.

The telephonic conversation between the appellee and Mr. Reid was testified to by Mr. and Mrs. Cheek, who heard what appellee said in that conversation. This testimony was competent. In the late case of *St. Paul Fire & Marine Ins. Co. v. McQuaid*, 114 Miss. 430, 75 So. 257, this court said:

"As to the law touching conversations over telephones: We think the law is well settled that such conversations are admissible in evidence. The fact that the voice at the telephone is not identified does not render the conversation inadmissible. The weight to be given such evidence is largely left to the jury, or to the chancellor, when the case is tried without a jury."

Similar testimony has been held to be admissible by the great weight of authority in this country.

"A telephone conversation between the parties, and upon the subject-matter of the litigation, having been testified to by one of the parties, may also be testified to by a bystander, so far as he heard it." *Kent v. Cobb*, 24 Colo. App. 264, 133 Pac. 424.

"The only question is whether a witness for the plaintiff properly was allowed to testify to what he heard the plaintiff say as a part of an alleged conversation with the defendant over the telephone, the plaintiff being in Boston and the defendant in Chelsea, and the witness being in the presence and hearing of the plaintiff. The witness had no personal knowledge with whom the plaintiff was talking, and did not hear anything



that was alleged to have been said by the defendant, and did not know that the defendant heard anything that the plaintiff said. . . . We think that the evidence was properly admitted. . . . The evidence that was admitted cannot be regarded as hearsay evidence or declarations made by the plaintiff in his own interest, simply because the witness did not know of his own knowledge that the other party to the alleged conversation was the defendant, or that there was any other party, or that the defendant heard what was said." *McCarty v. Peach*, 186 Mass. 67, 70 N. E. 1029, 1 Ann. Cas. 801.

The contract of renewal in this case became complete when Mr. Reid, who had authority to issue insurance and renew the same, agreed to renew this policy. The testimony of the complainant, which was believed by the chancellor, further shows that Mr. Blankenship, one of the partners in the insurance agency, knew of this renewal of Mr. Reid's and acquiesced in it. It is therefore immaterial as to what conversation took place during the fire or at the bank, after the fire, when they were searching for this insurance policy. For this reason we have not set out in detail this part of the testimony in the opinion.

The decree of the lower court is affirmed.

*Affirmed.*

---

LOCKMAN v. ALABAMA & V. RY. Co.

[77 South. 793, Division A.]

1. MASTER AND SERVANT. *Question for jury. Application of fellow servants' doctrine. Laws 1908, chapter 194. Hemingway's Code, section 6684.*

Where an employee of a railroad company while employed in loading rails upon a flat car was injured because some of his fellow servants gave an unusual or sudden jerk to the rail which they

were lifting to place upon the car which caused it to fall and injure his leg and there was no evidence as to why such sudden and unusual jerk was given in such case a peremptory instruction for the defendant was erroneous.

2. SAME.

In such case the jury would have been warranted in finding that plaintiff was injured because of the negligence of a fellow servant while engaged in loading a car for transportation over defendant's railroad so that the case would fall within chapter 194, Laws 1908 (Hemingway's Code, section 6684), giving railroad employees the same rights and remedies for injuries caused by an act or omission of the railroad company as are allowed by laws to other persons not so employed.

3. SAME.

In such case where there was no evidence that an engine was attached to the car at the time it was being loaded or that it was to be moved by steam, gas, gasoline, or lever power, the presumption arises that it was to be moved by the railroad company's usual motive power.

APPEAL from the circuit court of Rankin county.

HON. J. D. CARR, Judge.

Suit by Philip Lockman, against the Alabama & Vicksburg Railway Company. From a judgment on a peremptory instruction for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

*S. L. McLaurin and Robert Powell*, for appellant.

The learned counsel for appellee with his usual candor practically admits that the evidence in this case makes out a *prima-facie* case of negligence, but he seeks to avoid liability on the ground that the negligence shown was that of a fellow servant. To this we reply. The Acts of 1908, chapter 194, which reads as follows: Fellow servant rule abolished as to actions by railroad employees, etc. Section 1. Every employee of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever

power, and running on tracks, shall have the same rights and remedies for an injury suffered by him from the act or omission of such railroad corporation or others of their employees as are allowed by law to other persons not so employed.

But our learned friend replies that this does not protect us because, "we were not engaged in a labor peculiarly incident to the railroad business nor inherently dangerous and had no connection whatever with the operation of railroad locomotives, car or trains.

Now while we think the gentleman entirely too narrow in his construction of the scope of this statute, we will still meet him on his own ground. At the time of the accident plaintiff was an employee of the defendant railroad company, and was engaged as a section hand in tearing up a part of its sidetrack and in loading the iron rails on the company's flat car for transportation to other points.

We ask then is not the removing and shipping of iron rails from one point on the railroad to another and loading of railroad cars for transportation, connected with the operation of railroad locomotives, cars or trains?

How could locomotives or cars run if the rails were not laid and properly kept in repair? or what use for cars or trains to run if not loaded? But my friend says that loading cars with iron rails is not inherently dangerous.

Our supreme court in the case of *Hunter v. Ingram-Day Lumber Co.*, 110 Miss. 748 says: "The defendant company, by whom the plaintiff was employed owned and operated the railroad in question. This railroad was equipped with engines and cars propelled by steam and running on tracks, and in so far as the equipment is concerned it is certain that appellant's employer's outfit was such as is contemplated by the statute. The entire system that appellee had in operation at the time the appellant was injured was an arrangement to load

cars that were propelled by steam and run on tracks and the plaintiff at the time of his injury was engaged in loading one of appellant's cars on the railroad in question. It is not necessary in order for a person to recover under the terms of the Fellow Servants' Statute of 1908, that such person be injured by the actual running or movement of the cars, the legislature, acting within its discretion, has determined that all persons working in and about the operation of railroad trains are engaged in a hazardous business and are entitled to the protection afforded by the statute in question. All work in and around the operation of railroad trains is necessarily dangerous, whether that work has to do with the movement of cars or the loading of same or any other employment in the operating department of a railroad."

But why gild refined gold or paint the lily? We refer the court to two decisions of this court which cover every point in appellee's brief and decide adversely to his contention, to-wit: *Easterling Lumber Co. v. S. W. Pierce*, 106 Miss. 744, in which the court will find the matter exhaustively treated with numerous citations from the United States supreme court and other states in which section 193 of the Constitution and the subsequent acts and decisions construing them are fully discussed.

We think the case should be reversed and remanded for a new trial.

*R. H. & J. H. Thompson*, for appellee.

The kindly terms in which appellant's reply brief affirms that we have practically admitted that the testimony made out a *prima-facie* case of negligence are appreciated, but appellant's counsel failed to note that whatever admission of the kind can be inferred from our language was made only by way of argument, our contention having been that, should the court find

that the negligence of the railway company had been proved even *prima-facie*, still plaintiff is not entitled to a recovery. If the language of our brief be broader than this it was inadvertently made so.

We insist that the mere statement by the witness that a sudden jerk was made in moving the iron rail does not itself prove negligence. Such a statement is nothing more than the opinion of the witness. Men may and do differ about the character of the same act as to whether a jerk were usual or unusual; and in this case the plaintiff himself testifies that jerks of the same sort were frequent in handling the rails in question and that no complaint was made of them. This proves that the jerk in question was a customary one.

The case of *Hunter v. Ingram-Day Lbr. Co.*, 110 Miss. 744, 70 So. 901, upon which appellant's counsel seem confidently to rely, is not adverse to our contention. The opinion in that case delivered by Judge PORRER distinctly recognizes the scope and effect of the decision of this court in the Bradford Construction Company case and does not disapprove it. Speaking in that opinion of the Act of 1908, the opinion says:

"The intent and purpose of the Act of 1908, were to extend to the employees of railroads other than commercial railroads the same protection that it extended by section 193 (of the Constitution) to certain classes of employees of commercial railroads. In other words, it was the intention of the legislature in passing this act to put all employees employed in and about the dangerous business of railroading into the same category with reference to the fellow servant rule."

This is precisely the same as an affirmation that the constitutional provision (Sec. 193) was not enlarged or changed but its application simply extended to embrace the employees of railroads (such as logging railroads) other than commercial ones. So far the decision is in appellee's favor and not against our contentions.

The opinion in the *Hunter-Ingram-Day* case then proceeded to a statement of the kind of business in which Hunter, the injured employee, was engaged at the time of his injuries. The lumber company was found by the court to have been operating a railroad equipped with engines and cars propelled by steam and running on tracks and, in so far as the equipment was concerned, it was certain that the lumber company's outfit was such as is contemplated by the statute. Hunter was injured while loading a car which was run on tracks but the loading process itself was accomplished by the use of appliances propelled by the dangerous agency of steam. The court having so found, affirmed that: "The legislature, acting within its discretion, has determined that all persons working in and about the operation of railroad trains are engaged in a hazardous business and are entitled to the protection afforded by the statute in question. All work in and around the operation of railroad trains is necessarily dangerous, whether that work has to do with the movement of cars or the loading of same or any other employment in the operating department of the railroad."

The first sentence in the last quotation, from the opinion shows distinctly that the court had in mind the operation of railroad trains, whether belonging to commercial railroads or to logging railroads, and the last sentence from the quotation was uttered in respect to the same dangerous business. Hunter was injured while employed about a work which was being carried on by steam power. The appellant in this case was injured in a work in which was not used either steam, gas, gasoline, or lever power or any other power mentioned in the statute. It would be to extend the statute beyond its terms and, we say it with due respect, judicial legislation, to hold that a case where hand power only was used in the work is within the statute.

The court did not in the *Hunter-Ingram-Day* case decide any such a proposition and, while the language of Judge POTTER may be too broad, yet it must be interpreted in the light of the facts of the case before him. What Judge POTTER meant to say was that all work in and about the operation of railroad trains is necessarily dangerous when carried on by steam, gasoline, electric, etc., power. He did not mean to interpolate into the statute the words "hand power."

SMITH, C. J., delivered the opinion of the court.

Appellant instituted this suit to recover damages for an injury alleged to have been sustained by him while employed by appellee, because of the negligence of a fellow servant. At the close of the evidence a motion to exclude was sustained, and the jury instructed to find for appellee, and there was a verdict and judgment accordingly. According to this evidence, appellant, with the assistance of a number of fellow servants, was engaged in loading iron rails upon one of appellant's cars. These rails were being taken from an abandoned track, running from appellee's road to a quarry several miles away. While one of the rails was being placed in the car it was given an "unusual" or sudden jerk by some of appellant's fellow servants, which caused it to fall upon and injure his leg. Why this sudden or "unusual" jerk was given does not appear. There was no evidence of an engine being attached to the car at the time it was being loaded, or that it was to be moved by steam, electric, gas, gasoline, or lever power, other than the presumption arising that it was to be moved by appellee's usual motive power.

The peremptory instruction should not have been given, for the reason that the jury would have been warranted in finding that appellant was injured because of the negligence of a fellow servant, while engaged in

loading a car for transportation over appellee's railroad, so that the case falls within chapter 194, Laws of 1908 (section 6684, Hemingway's Code), and is ruled by *Hunter v. Ingram-Day Lumber Co.*, 110 Miss. 744, 70 So. 901, and *Railroad Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675.

*Reversed and remanded.*

McSHANE COTTON Co. v. SMITH.

[77 South. 793, Division B.]

1. JUDGMENT. *Default judgment. Sufficiency of pleadings.*

A bill in chancery by one partner to cancel and annul a default judgment against a partnership consisting of two brothers on the ground that the judgment was void on the face of the record, because the exhibits filed with the declaration contradicted its averments, will not be sustained, where the declaration averred a course of dealing between the defendant and plaintiff which resulted in defendant being indebted to plaintiff in a specifically named amount, and with the declaration an exhibit was filed which showed the dates of the money advanced, how the advances were made, and upon whose drafts the payment was made; although the memoranda or statement filed with the declaration showed that the other partner drew the drafts which were paid, presumably in his own name, but the declaration averred that the advances were thus made to the partnership.

2. SAME.

Such declaration in the original suit upon which a judgment by default was rendered will be construed to charge that the complainant in the chancery suit together with his brother was engaged in a certain business and that one of them, for both, drew certain drafts for the joint account which were paid by plaintiff in the original declaration, and if defendant desired to be enlightened as to just what he was charged with he should have appeared and made his defense if any he had. If his brother was not authorized to draw the drafts for the account of the partnership, then was the time for him to speak. If he was not a partner, he should have reasonably so pleaded in response to the summons served on him.



APPEAL from the chancery court of Leflore county.  
HON. JOE MAY, Chancellor.

Suit by W. H. Smith against the McShane Cotton Company. From a decree in favor of complainant, defendant appeals.

The facts are fully stated in the opinion of the court.

*M. B. Grace*, for appellant.

This court in the case of *Martin v. Miller*, 60 So. 772, as well as in a number of other well-considered decisions of this court, has held that: "All presumptions of law are in favor of the correctness of judgments." We are mindful of the fact this court has held in an insurance case, the same being a suit on a policy of life insurance and the policy being made a part of the declaration, the declaration not alleging that proof of death, or proof of loss had been made, a judgment by default was a nullity, because the declaration would not support a judgment. In the instance of the insurance case, this is one of the prerequisites to a suit on a policy of insurance, that the beneficiary in the contract has advised the insurer, in the manner designated in the policy, that the death has occurred, or the loss has been sustained, and without this allegation in the declaration, no proof of this fact would be admissible therefore without this allegation in the declaration the declaration would not support a judgment by default. This is not the case here. The declaration charges and alleges all the plaintiffs would be required to prove, if a plea of the general issue is filed, to entitle the plaintiffs to a judgment. This being true, the demurrer should have been sustained, and the bill dismissed.

We come now to consider the cause from the aspect of the validity of the decree of the court. If the Statute of Jeofails, section 808 means anything at all, it means that the verdict and judgment of the court cures all

errors in the pleadings, unless the declaration fails to state a cause of action. Let us examine this statute just a little in this connection. The first part of the section reads: "A judgment shall not be stayed or reversed, after verdict, for any insufficient pleading, etc." And near the concluding part of the statute we have this language: "Neither shall judgment by default be reversed, nor a judgment after inquiry of damages be stayed or reversed, for any omission or fault which would not have been good cause to stay or reverse the judgment if there had been a verdict on issue joined."

The declaration in this cause specifically states that the defendants agreed and promised to pay the amount found to be due the plaintiffs after they had examined the books or account and found the amount sued for to be due. It further charges that the defendants were jointly and severally liable to plaintiff for the amount sued for in the declaration. The statements of the drafts drawn by defendants on plaintiffs and paid by defendants, added nothing to the declaration, and was merely surplusage. This court has held, as far back as 2 Howard, that defects in the declaration are cured after judgment by default. *Ragsdale v. Caldwell*, 2 How. (Miss.) 930; *Wells v. Woodley*, 5 How. (Miss.) 484; *Breck v. Smith*, 44 Miss. 690. Of course this means defects which are not essential to stating a good cause of action.

Granting for the sake of argument, the statements attached to the declaration was a bill of particulars, and an imperfect bill of particulars, process was served on the appellee, and he had his day in court, and could have made a motion to require the plaintiff to furnish a more complete bill of particulars but he ignored the process of the court. The matter is closed. *Tierney v. Duffy*, 56 Miss. 364; *Bloom v. McGrath*, 53 Miss. 249.

Section 729 of the Code reads as follows, quoting a portion of this section: "If it contains sufficient mat-

ter of substance for the court to proceed upon the merits of the cause, it shall be sufficient.

This being a very simple proposition of law, we take it as a matter of course, it is unnecessary to burden the court with the citation of all the decisions under the Statute of Jeofails, and we think it is sufficient to refer the court to this statute and the decisions of the court collated thereunder.

*Gardner, McBee & Gardner*, for appellee.

We call attention to the fact that the declaration does not undertake to show who composed the firm of Smith Brothers, although counsel for appellant, in his brief, undertakes to show who composes the firm of Smith Brothers and that the firm of Smith Brothers was J. D. Smith, Jr., and W. H. Smith, appellee, but, the declaration does not so charge.

We contend that the judgment by default in this case was absolutely void for several reasons: 1. Because the exhibit "A" to the declaration shows that the account was due by J. D. Smith, Jr., and not by appellee; 2. The account is not itemized, even if it had been against appellee; 3. The account is not sworn to and the judgment shows that no proof was introduced when the judgment by default was entered showing any indebtedness; to the contrary the judgment by default recites:

"It appearing to the court that process has been duly served upon each of the defendants for more than thirty days, and no plea being filed, it is therefore the judgment of the court that plaintiff McShane Cotton Company, a partnership composed of E. R. McShane and H. F. McShane, doing business under the style of McShane Cotton Company, do have and recover, etc."

We submit that Exhibit "A" in this case will control as to who owned the account. It is true the declaration undertakes to charge that "J. D. Smith, Jr.," and "W. H. Smith" are responsible, and refers to exhibit "A" to sustain their allegations that J. D. Smith, Jr., and appellee were indebted to plaintiffs, but, when we come to examine the exhibit which, of course, is a material part of the declaration and which will control as to who owes the indebtedness, we find that plaintiffs do not undertake to recover upon any indebtedness due by J. D. Smith, Jr., and W. H. Smith, appellee, but, solely upon the indebtedness of J. D. Smith, Jr.

We submit that our Statute of Jeofails does not control in this case, for the reason that this section of the Code does not apply where the declaration fails to show a right of recovery. *Penn. Mutual Life Ins. Co. v. Keaton*, 95 Miss. 708. In other words, this statute only cures defects of the pleadings, and not those of proof. In this case, it was a question of proof, that is to say a question of fact as shown by the account sued on.

We submit that plaintiffs could not have proved a better case than they charged in the pleadings, and having sued on an account against J. D. Smith, Jr., they certainly cannot recover a judgment by default against "J. D. Smith, Jr.," and "W. H. Smith" appellee.

The exhibit will control, we submit, as to who is liable, and on its face it shows that no claim was ever against W. H. Smith, appellee.

Cook, P. J., delivered the opinion of the court.

Appellee was the complainant in a bill of complaint filed in the chancery court of Leflore county. The bill of complaint alleged that a certain judgment by default was rendered against him by the circuit court of

Leflore county at the November term, 1913, of said court, and prayed that same be canceled and held for naught. The grounds alleged for the cancellation of the judgment were: (a) That he had no notice of the suit at law, in that he had not been served with process; (b) that the judgment by default was void on the face of the record.

A demurrer was interposed by the defendant, McShane Cotton Company, which was overruled by the court. Whereupon the bill of complaint was answered, the answer specifically denying the allegations of the bill.

As to the first ground for relief, that complainant had not been served with process in the suit at law, suffice it is to say this allegation was not sustained by the evidence; on the contrary, he admitted that he had been duly and legally served with process.

So, as we understand the record, there was only one point left for decision: i. e., Was the judgment by default "absolutely void" on the face of the record?

The declaration upon which the default judgment was entered by the circuit court averred that the plaintiff, McShane Cotton Company, was engaged in the business of cotton factors, domiciled at Greenwood, and that the defendants, J. D. Smith and W. H. Smith, in the fall of the year 1910, obtained from the plaintiff, at various times, certain named sums of money, amounting in the aggregate to the sum of one thousand nine hundred and seventy dollars and ninety-eight cents; that defendants had delivered to plaintiff at various times cotton of the aggregate value of one thousand four hundred and twenty-six dollars and seventy-eight cents, leaving a balance due of five hundred and fifty-four dollars and twenty cents, and demanded judgment for the balance, together with six per cent. interest. The declaration further averred that plaintiff had rendered to defendants an account of sales of the cotton shipped

showing expense of handling same and commissions and filed with the declaration itemized statements of the amounts of money advanced and also of the credits allowed the defendants for cotton delivered, and asked judgment for the balance as stated.

The statements referred to were: First, a statement showing the advancement of moneys, the date of each draft, on what bank drawn, and the amount thereof, and then a credit for the value of the cotton delivered; second, a separate statement of the compress number and weight of each bale of cotton received and sold for the account of defendants, insurance, storage, and weighing, and commissions for selling same.

But complainant insists that there was a fly in the ointment fatal to the default judgment rendered by the circuit court on the declaration and exhibits thereto.

The first-mentioned exhibit is headed "Mr. J. D. Smith, Jr., Sidon, Miss., in Account with McShane Cotton Co.," etc. That is the statement of money advances by McShane Cotton Company. It is pointed out that this statement purports to be a statement of advances to J. D. Smith, Jr., alone, and that the complainant, W. H. Smith, is not mentioned in the exhibit. From this premise it is argued that the averments of the declaration and the exhibit are in direct conflict, and that the exhibit must control; in other words, the court was without authority to render a judgment by default against the defendant upon this ambiguous pleading.

As we get it, the chancellor was of opinion that, while the declaration itself made out a case against the complainant, the exhibit to the declaration muddled the waters, and the exhibit contradicted the averments of the declaration.

It is true, if the declaration fails to state a cause of action, a judgment by default may be set aside, but in this case the declaration does state a cause of action,

but the exhibit must prevail, and if it does prevail the appellee must go scot-free. The statute does not extend to a case wherein the declaration, as a whole, does not state a cause of action against the defendant, and it is contended in this case that the declaration and the exhibits thereto do not state a cause of action upon which a default judgment could be rendered.

The declaration does aver a course of dealing between the defendant and plaintiff which resulted in defendant being indebted to plaintiff in a specifically named amount. With this declaration an exhibit was filed which showed the dates of the money advances, how the advances were made, and upon whose draft the payments were made. True, the memoranda, or statement filed with the declaration shows that the partner drew the drafts which were paid, presumably in his own name, but the declaration avers that the advances were thus made to the partnership. This declaration was entirely ignored by defendant, who is complainant here, until he filed this bill of complaint after the statute of limitations had run against the original debt.

This court said, in *Railroad Co. v. Schragg*, 84 Miss. 152, 36 So. 198:

“Counsel’s objection, in short, ‘has this extent, no more’: That she is simply not entitled to recover under this declaration; and, that being the extent of his objection, he was bound under sections 718 and 746 of of the Code of 1892 to interpose it seasonably in the court below, because it is at last nothing but an objection to the form of pleading.”

Now, we construe the declaration in the original case to charge that the complainant and appellee in this suit, together with his brother, was engaged in a certain business, and that one of them, for both, drew certain drafts for the joint account which were paid by plaintiff, the McShane Cotton Company.

If defendant desired to be enlightened as to just what he was charged with, he should have appeared and made his defense, if any he had. If his brother was not authorized to draw the drafts for the account of the partnership, then was the time for him to speak. If he was not a partner, he should have seasonably so pleaded in response to the summons served on him.

*Reversed and remanded.*

WOOTEN v. HICKAHALA DRAINAGE DISTRICT ET AL.

[77 South. 795, Division B.]

1. DRAINS. *Formation of drainage districts. Notice to landowner. Statute.*

Laws 1912, chapter 195, as amended by Laws 1914, chapter 269, providing for the organization of drainage districts do not contemplate that the published notice to the owners of the land shall be directed to each owner by name. The proceedings prescribed were and are *in rem* and are of such a nature as would arrest the attention of all interested persons and any other method would be impracticable.

2. CONSTITUTIONAL LAW. *Delegation of legislative power to chancery court.*

Laws 1912, chapter 195, as amended by Laws 1914, chapter 269, providing for the creation of drainage districts is not unconstitutional because it confers or imposes jurisdiction upon the chancery court in cases wherein the proposed district is to embrace territory situated in more than one county.

Appeal from the chancery court of Tate county.

HON. J. G. MCGOWAN, Chancellor.

Suit by R. B. Wooten against the Hickahala Drainage District and others. From the decree, complainant appeals.

The facts are fully stated in the opinion of the court.



*M. H. Thompson*, for appellant.

The Constitution of the United States of America, section 1, of article XV, of the articles in addition to an amendment of the Constitution prohibits any state from passing any law depriving any person of life, liberty or property without due process of law.

Under the first drainage laws of Mississippi known as The Alcorn Act, the chancery clerk was required to mail notices of the intention of the board to create the district, as well as assessment of benefits, to each owner of the lands contained in the district and this method of the notice of the landowners was the embodiment of the legislature's idea of taking property by "due process of law" and also met the interpretation of the supreme court of Mississippi as to the meaning and import of "due process of law." *Brown et al. v. Board of Levee Comrs.*, 50 Miss. 468.

But the laws under which the district in question was organized dispensed with this kind of process entirely, providing only that notice of the intention of the board to create the district, as well as notice of the assessment of benefits, to be published for two weeks in a newspaper having a general circulation in the district, no copy of said notice is required to be mailed to non-resident landowners or affidavit made that his residence or post office address is unknown. I submit that the legislature has not the authority and power to make such radical change in the notice to be given to landowners.

In *Brown et al. v. Levee Comrs.*, 50 Miss. 468, the supreme court of Mississippi, in defining the power of the legislature over process says: "The provision of the bill of rights that no person shall be deprived of life, liberty or property, except by due process of law inhibits the legislature from dispensing with personal service where it is practicable and has been usual under the general law." It does not take from the legislature

power to amend the law and change the formula of remedies; provided, the fundamental right of personal notice, actual or constructive in personal suits, is not taken away. This cannot be designated as an action *in rem*. Chapter 269, Laws 1914, section, requires that "notice be given to the landowners," and then proceeds to outline a method of giving this notice, which, we respectfully submit, falls short of the constitutional guarantee that no person's property shall be taken without "due process of law." See *Balch v. Glenn*, 85 Kan. 735; Amer. Ann. Cases, 1913, page 406.

The appellant does not contend that constructive notice in a reasonable and sufficient form, and likely to reach the cognizance of the landowners is not such, notice as is justified by the judicial interpretation of due process of law, and we respectfully submit that the notice provided for by the drainage laws of Mississippi in question is not sufficient or likely to reach the cognizance of the owner. *Pierce v. City of Huntsville*, 64 So. 301.

The drainage chapter in question provides that the chancery court, where the land is situated in more than one county shall proceed to organize the drainage district and sections 3913, 3920, 3921 and 3922, provide the methods by which parties may be brought into chancery court, Mississippi Code of 1906. None of which provision are contained in the drainage act in question; we therefore respectfully submit that one kind of process for one class of cases, and another kind of process for another class of cases, in acquiring jurisdiction in the same court, is not permissible.

While the legislature may change the form, the fundamental rights cannot be disregarded. *Brown et al. v. Levee Comrs.*, 50 Miss. 468, 478. The publication in the case at bar does not meet the requirements of chapter 296, Laws of Miss. 1914, in the following particulars: First, notice to the landowners fails to meet the requirement of section 1 of said chapter 269,

in that the landowners' names are not set out; second, notice to the persons, owning or interested in lands in said district of the filing of engineer's report is defective in that there is an erroneous description of the metes and bounds of the district, under which said defective notice, said district was organized, and later by a blanket order, under another notice attempted to be perfected; third, the notice of the assessment of benefits is vague, indefinite and insufficient, because the bulk description of the land is not such description as was and is contemplated by section 7, page 337, of said chapter 269, Laws 1914.

Appellant herein, complainant in the court below, respectfully submits that the drainage chapter in question, to-wit: chapter 195 of the Laws of 1912, as amended, violates sections 159, 160 and 161, of the Constitution of the state of Mississippi of 1890.

These sections of the Constitution confer and define the jurisdiction of the chancery courts of Mississippi, said section 159 enumerating matters in which the chancery court has jurisdiction; said section 160 giving chancery courts jurisdiction to cancel deeds, remove clouds on title, etc., while section 161 gives said court jurisdiction, concurrent with the circuit court, over suits on official bonds, and in no instance is the chancery court given jurisdiction over drainage matters, drainage systems being a modern project and unknown to the laws of Mississippi prior to 1890. Therefore the only instance in which there is a possibility for the chancery court to acquire jurisdiction in matters in drainage is in subsection A of section 159, of the Constitution, "all matters in equity or subsection F," all cases of which said court had jurisdiction under the laws in force when this Constitution was put in operation. However chapter 195, Laws 1912, as amended, invests the chancery courts with the authority to establish drainage districts where the lands embraced is situated

in more than one county, and appellate jurisdiction where the lands are situated in one county.

We respectfully submit that the establishment of a drainage district is not a matter of equity. "Equity is defined to be that system of justice which was administered by the high court of chancery in England." *Smith v. Everett*, 50 Miss. 575; *Bank of Miss. v. Duncan et al.*, 52 Miss. 740.

The state Constitution is a limitation, and not a grant of power. The mandates of the Constitution are the supreme law to the legislative, executive and judicial departments of this government. *State v. Skaggs*, 46 So. 268.

The legislature cannot vest in the chancery courts duties and powers, other than those embraced in the sections of the Constitution creating and defining the powers and duties of the chancery courts of Mississippi. *Bank of Miss. v. Duncan et al.*, 52 Miss. 740; *Smith v. Everett*, 50 Miss. 575; *Powell v. McCamey*, 143 Pacific, 752; *State v. Tincker*, 166 S. W. (Mo.) 1028.

The vesting in the chancery courts the authority and duty of organizing a drainage district cannot be justified under the police power of the state. While the courts cannot inquire into the wisdom of the legislature in exercising, in a reasonable way, the police power, however, the police power must be exercised within constitutional limitations. *State v. Arminstead*, 60 So. (Miss.) 778; *State of Arkansas v. Kansas & T. Coal Co.*, 96 Fed. 353.

We do not contend that the creation of a drainage district is not within the power of the legislature and that the legislature may delegate the power and authority to create drainage districts to some body or tribunal, but we contend that the power and authority cannot be delegated to a court, the chancery courts of the state, whose jurisdiction over property and persons is prescribed by the Constitution, and which constitutional

provisions do not specifically or inferentially include the establishment and supervision of drainage districts, and in fact said power being indirectly prohibited, in that it is not specifically granted.

The drainage laws in question, to-wit, chapter 195 of the Laws of 1912, as amended, violate section 170 of the Constitution of the state of Mississippi, in that the legislature delegates the fiscal and civil affairs of a county to a board other than a board of supervisors.

Said section 170 of the Constitution making the board of supervisors the sole agency for the handling of county affairs, and said chapter 195 of the Laws of 1912, as amended delegates certain acts in the creation of drainage districts to a board of commissioners, which said acts are not reviewed by the board of supervisors, to-wit the estimate of the costs of the ditch, location of the main and lateral ditches, and the probable cost of all work to be done, which filed with the clerk is not to be reviewed or approved by the board, said findings being final, no appeal therefrom being provided for. Section 6, page 335, Laws 1914.

Said chapter also provides that the commissioners shall issue the bonds of said district, which action of the commissioners is not reviewed or approved by the board of supervisors. Section 15, page 342, Laws 1914.

In *Cox v. Wallace*, 56 So. 461, at page 464, subsection 5, Chief Justice MAYES, substantially holds that the board of supervisors are to be the sole agencies through which drainage districts may be organized, or that the agencies must be an arm of the board of supervisors, and report all of its findings to the board of supervisors for adjudication. This decision was had under the Code drainage, or "Alcorn Act," which said act made it the duty of the commissioners to report to the board of supervisors all of their acts and findings for approval or disapproval by said board of supervisors. *Ex parte*

*Fritz*, 38 So. 722; *Board of Supervisors of Yazoo County v. Grable*, 72 So. 77.

In the case of *Lowe v. Black Bayou Drainage Dist.*, 66 So. 643, it seems, from the statement of facts, that the district was created by the chancery court, however the jurisdictional question was not raised. We respectfully submit that the case should be reversed and the injunction prayed for herein made perpetual.

*J. F. Dean and Holmes & Sledge*, for appellee.

As is well known to this court, in passing upon the constitutionality of any act, the rules of construction in such cases are very strict. Every law passed by the legislature is *prima-facie* constitutional. *Cole v. Humphreys*, 78 Miss. 163.

Where there is a reasonable doubt of its constitutionality the courts should uphold the law. *Natchez R. R. Co. v. Crawford*, 55 So. 598. It is no longer an open question that the state has the right to establish drainage districts for the purpose of reclaiming swamp and overflowed lands and to promote the public health thereby, and to administer the affairs of such districts the legislature may vest authority in any tribunal that it may designate. The case of *Hagar v. Reclamation District*, reported in 111 U. S. 701, is a leading case on this subject and has been consistently followed by all other states in which the questions there decided have arisen, including the state of Mississippi, so that this court need not look for authority elsewhere. *Cox v. Wallace*, 100 Miss. 536; *Jones v. Belzoni Drainage District*, 102 Miss. 796.

Appellant complains that the power of taxation is granted to the chancery court and no such power can be given to the chancery court by the legislature. As stated above, authority to carry into effect the drainage laws of the state may be vested in any tribunal the

legislature may designate, but if this were not true, the contention of appellant would be unsound for he confuses taxation with assessed benefits. The chancery court in passing on benefits assessed against each tract or parcel of land in a drainage district is not assessing or passing on the assessment of taxes, but is simply and only seeing that a fair and equitable distribution of benefits should be and is assessed against each separate piece of land or property. This question has been fully settled in this state by this court in the case of *Edwards House v. Jackson*, 91 Miss. 429. It will be remembered that in the case at bar all the lands were in Tate county and as a matter of fact the chancery court did not make or pass any orders but they were made by the board of supervisors.

Appellant also raises the time-worn question of "notices," "due process of law," etc. This question has been settled for generations by every state in the Union and by the United States court in decisions too numerous to quote. The court has but to refer to the revenue laws of different states to see that notice by publication to a taxpayer is all that is required and that such notice is "due process;" but this question has been settled in Mississippi as in other states by decisions of its highest court and we refer to two of these recent cases. *Yazoo County v. Grabble*, 111 Miss. 893; *Simmons v. Hopson Drainage Dist.*, 72 So. 901.

Under the drainage scheme provided for by the law here attacked, the taxpayer, if he might be termed such, has had notice of every step of the proceeding by publication and "at the end and before final liability he had an opportunity to object to all" (111 Miss. 893), and had the right to appeal if he felt aggrieved at the assessment of benefits against him. He elected not to appeal but to attack the law and he waited until after a large portion of the revenues of the district had been expended.

The court has said the valuation as fixed by the board of commissioners can only be questioned by an appeal to the circuit court. *Donnell v. Revenue Agent*, 109 Miss. 579. This court knows, as a matter of common knowledge, that millions of dollars of bonds have been issued under the laws here attacked; millions of dollars of improvements have been made, so beneficial in their nature that the good work is spreading to every part of the state, and this court knows that to declare these laws unconstitutional would work untold confusion and loss, and for these reasons alone this court would be slow to declare the law unconstitutional, even without the plain authorities here cited showing its constitutionality, but after the reading of these authorities there can be no doubt much less a reasonable doubt, of its constitutionality and the decree should be affirmed.

*F. H. Montgomery as amicus curiae.*

Counsel for the appellant in his most excellent brief, has stated fully the facts, as well as the questions involved, so I shall proceed directly to a discussion of some of the legal points involved without further elaboration.

Was the notice of the landowners in the proposed drainage district provided for by section 1 of chapter 195, of Laws of Mississippi of 1912, which notice was attempted to be employed in this case, sufficient to constitute due process of law?

Due process of law, or the law of the land, was defined to be the general law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. It means that every citizen shall hold his life, liberty and property under the protection of general rules which govern society.

The question here is, whether or not the notice to landowners provided by chapter 195 of Laws of 1912, and sought to be employed in this case, was due process of law. It is important at the outset, therefore, to see



what the law of the land was in reference to the giving of judicial notice at the time of the enactment of the statute. *Bardwell v. Collins*, 46 N. W. 315, 44 Minn. 97; 9 L. R. A. 152; 20 Am. St. Rep. 547.

It will be unnecessary to search beyond the judicial decisions of this court, for "ancient landmarks" which have been recognized and observed in judicial proceedings in Mississippi. In the case of *Brown v. Board of Levee Commissioners*, 50 Miss. 468, the court speaking through Justice SIMRALL said: "The provision of the bill of rights that no person shall be deprived of life, liberty or property, except by due process of law, inhibits the legislature from dispensing with personal service, where it is practicable, and has been usual under the general law. It does not take from the legislature power to amend the law and change the formula of remedies: provided the fundamental right of personal notice, actual or constructive, in personal suits, is not taken away. Courts of common law and equity cognizance have always exacted personal notice, if practicable; that is, if the defendant was commorant within the territorial jurisdiction, and if he could be found. But in order to prevent a failure of justice, *ex necessitate*, if personal service could not be given, an inferior mode such as in the wisdom of the legislature might be thought likely to impart actual notice, has been allowed such as leaving a copy of the summons with a member of defendant's family, or affixing it to the door of his domicile and publication in a newspaper in certain cases."

In the light of this decision which has never been overruled or modified so far as I can find, it is plain that the law of the land in Mississippi has always required in personal actions, personal notice where the defendant was a resident of the county, or could be found in the state.

In the case of *Larson v. Larson*, 82 Miss. 116, this court held that a personal judgment could not be render-

ed on summons by publication, against a non-resident defendant. Manifestly, then a judgment rendered against a resident defendant on summons by publication would be unauthorized. This is in no sense of the word an action *in rem*. The organization of a drainage district under this law bears every characteristic of an action *in personam*.

This being the case, then does the method of giving notice to the landowners provided by the act, fulfill the requirements of the due process of law clause in our Constitution? I do not mean to argue to the court that constructive notice in a case of this nature, which was fair, and which was reasonably calculated to arrest the attention of all landowners in the district, would not answer this requirement. I am not arguing that question one way or the other now, but only the question, whether or not the notice provided by the act in any case could be held to meet the requirements of our constitutional provision.

In the case of *Brown v. Board of Levee Commissioners*, 50 Miss. 468, the court had under consideration the sufficiency of the notice provided for under chapter 53, page 217, Acts of 1872, which was an act providing for a proceeding in chancery for the purpose of quieting doubtful tax titles held by the board of levee commissioners, in Boliver, Washington and Issaquena counties. The notice provided by section 2 of this act is singularly similar to the notice provided by chapter 195 of Laws of 1912.

Your honor will observe that the statute of 1872 under consideration by the court in *Brown v. Levee Commissioners*, *supra*, is much more comprehensive than the Act of 1912, in its provision in reference to the giving of notice to the landowners. But this court in holding the statute unconstitutional said: "It proposes to to bind and conclude the interests of persons in private property without designating them by name as defendants, without a good or any sufficient reason for such

departure from the general law. Because it expressly denied personal service of process upon the defendants, when it is evident that many, perhaps most of them, are residents of the county and state, and amenable to such process; because in a personal suit, it directs notice by publication without designating the names of the defendants, when many, if not most of them, by the general law, were entitled to personal service of notice, and when that form of publication is allowable, and in instance where the complainant does not know and has not the means of finding out the names of parties; because the statute and the proceedings under it are unusual, extraordinary, and not calculated to afford a full investigation, and proper determination of any separate controversy that might arise, but likely to result in wrong and injustice to many individuals; because the proceeding authorized is extraordinary and unusual, without precedent in the legislative and judicial history of the state; because it had the seeming of giving judicial sanction, and thereby conclusiveness, to a decree for the sale and transfer of property, when the legislature itself was incompetent to direct the sale to be made, and when, according to the law of the land, the chancery court could not take cognizance and adjudge in the circumstances named in the act.

We are of opinion therefore, that the decrees of the respective chancery courts are *coram non judice*, and of no validity.

It appears to me that each of these reasons is applicable to the circumstances of this case. I am unable to draw any distinction in principle between the case quoted from and the case at bar. *Wilkinson v. Gaines*, 96 Miss. 688. Does chapter 195, Laws of 1912, as amended by chapter 269, Laws of 1914, violate the Constitution of the state of Mississippi? I contend it does. Sections 159, 160, and 161 of the Constitution of the state of Mississippi, set forth a catalog of the subject-matters

over which the chancery court shall have jurisdiction. In none of these sections is the chancery court given power to establish or administer the affairs of a drainage district. The most elastic construction that could possibly be placed upon these sections, would not permit the chancery court to assume jurisdiction over the organization and administration of a drainage district.

There are certain familiar maxims long since promulgated by the courts of this country, and universally followed by the appellate courts of the different states, which will aid us in pursuing this inquiry. I direct the attention of the court first to the following maxim, where those things are mentioned to which a court has jurisdiction. No other is implied. *Marbury v. Madison*, 1 Cranch, 137; *Brown on Jurisdiction*, p. 1, sec. 1.

Another maxim, equally ancient and well established, is that the express mention of one thing implies the exclusion of another. *People v. Hastings*, 29 Calif. 449; *Brown on Jurisdiction*, p. 47, sec. 10; See, also, *Sandy Bayou Mandamus Case*, 87 Miss. 125, 144. This is but the converse of the first maxim quoted, both of which constitute familiar legal learning, and require no citation of authority.

My contention is simply this, that the Constitution of the state by sections 159, 160 and 161, cataloged the subject-matters over which the chancery court should have jurisdiction; and that by these sections, the jurisdiction of the chancery court is limited to these matters, and all other matters are excluded.

That the Constitution itself clearly places this construction upon these sections, by lodging jurisdiction of all other matters not specially confided to the chancery and other courts, in the circuit court.

Even if it could be argued that the organization of drainage districts was a valid exercise of the police power, the power could not be exercised in contravention of the Constitution. The police power must yield to the

Constitution. *State v. Armstead*. (Miss.), 50 So. 778. The contention here is clear cut, and I need not pursue the argument further.

This act has been before this court for consideration in the case of *Jones v. Belzoni Drainage District*, 102 Miss. 796; *Low v. Black Bayou Drainage District*, 107 Miss. 583; and *Board of Supervisors v. Grable*, 72 So. 77, but singularly none of the questions raised by the appellant in this case were adverted to either by counsel or court.

COOK, P. J., delivered the opinion of the court.

The Hickahala drainage district was organized under chapter 195, Laws of 1912, as amended by chapter 269, Laws of 1914. The proposed district was wholly in the county of Tate, and the proceedings were initiated by the requisite number of landowners of the proposed district, residing in Tate county, and the organization of the district was by the order of the board of supervisors of that county. The procedures prescribed by the statutes were literally complied with. The notice directed to the owners of the lands embraced in the proposed district was published in a newspaper as prescribed, and the notice that the board would, upon a given date, proceed to assess the benefits accruing to the several tracts of land composing the district. These notices were not given to the owners by name, but were addressed to the owners of lands described.

The appellant, in his bill of complaint, alleged that the notices of the organization of the district and the assessment of benefits prescribed by the statutes were not sufficient under the Constitution; in other words, the statutory plan deprived him of his property without due process of law. Upon the presentation of the bill of complaint to the chancellor a temporary injunction was issued by him restraining the collection of the assessed benefits to his land. From a decree dissolv-

ing the injunction an appeal is prosecuted to this court.

It seems to us that the statutes do not contemplate that the published notice to the owners of the land shall be directed to each owner by name.

The proceedings prescribed were and are *in rem*, and are of such a nature as would arrest the attention of all interested persons. Indeed, any other method would be impracticable. If it is necessary to name the owners in the published notice, the scheme would be impossible. An abstract of title of all the lands would have to be made, and the time and labor necessary to discover and declare the titles to each separate subdivision of land would destroy all attempts to organize improvement districts. In fact, this very point has been decided by this court, and the narrow view was rejected. *Cox v. Wallace*, 100 Miss. 541, 56 So. 461; *Jones v. Drainage District*, 102 Miss. 796, 59 So. 921.

It is contended that the law is unconstitutional because it confers or imposes jurisdiction upon the chancery court in cases wherein the proposed district is to embrace territory situated in more than one county. It is said that the Constitution limits the jurisdiction of that court, and the legislature is without power to extend or limit the same. We think *Yazoo County v. Grable*, 111 Miss. 893, 72 So. 777, disposes of that contention.

There is no merit in the contention that the description of the territory forming the proposed drainage district is "unintelligible." We have gone over the engineer's description with due care, and we find no difficulty in locating each tract of land within the limits of the area which is to compose the district.

While we believe that all of the questions raised in this appeal have already been determined adversely to appellant's contention, the fact that the improvement district was organized and bonds authorized and sold before the suit was begun seems to call for an opinion in this case.

*Affirmed.*

## UNION COTTON OIL Co. v. PATTERSON.

[77 South. 795, Division B.]

*COMMERCE. Sales. Interstate transactions. Code 1906, section 935.*

Where the agent of an Alabama corporation purchased cotton seed "F. O. B. Como, Miss., mill weights to govern," for shipment to Alabama, where the mill was located and where the contract was required to be approved, it was not a Mississippi contract but an interstate transaction, and on failure to deliver the seed, the corporation could sue and recover for breach of contract in Mississippi although it had not filed its charter and paid the fee required under section 935, Code 1906.

APPEAL from the circuit court of Panola county.

HON. E. D. DINKINS, Judge.

Suit by the Union Cotton Oil Company against A. M. Patterson. Judgment on peremptory instruction for defendant, and plaintiff appeals.

The facts are fully stated in the opinion of the court.

*L. F. Rainwater*, for appellant.

I respectfully submit that there are two questions involved in this case, the correct answer to either one of which, is sufficient to reverse the holding of the trial court, viz: First, was appellant doing business in Mississippi within the purview of our statute? Second, if it can be said that the act of appellant in contracting for the purchase of cotton seed from appellee constituted a doing business in this state, was such business interstate commerce, and not subject to regulation or restriction by the statute?

First, as to doing business: The undisputed proof is that appellant had a mill in Birmingham, Alabama, and at no other place. The business was the conversion of cotton seed into oil, cakes, hulls and linters, and (incidentally, and necessarily) the purchase of cotton

seed for that purpose. The purchase of cotton seed was not the business of the corporation, but only an incident to its business. The purchase of agricultural implements is not the business of farming, but incidental and necessary to the conduct of the business of farming. The purchase of law books is not the business of practicing law, but a very necessary incident to the business of a lawyer. Appellant did not purchase cotton seed for the purpose of resale but, solely for the purpose of converting them into oil, meal, etc.

I maintain that in order for a foreign corporation to be amenable to requirements of our statute as to filing, etc., must be engaged in the prosecution of its principal business, and that an occasional transaction which is merely incidental to its principal business is not meant. "The foreign corporation must transact within the state some substantial part of its ordinary business, through an agent appointed for that purpose." *Am. & Eng. Ency. Law* (1 Ed.), p. 348; *United States v. Am. Bell Tel. Co.*, 29 Fed. 17.

"Occasional purchases at St. Louis, either by correspondence, or occasional sending of an agent for the purpose, did not make the foreign corporation to be doing business in Missouri. *St. Louis Wire Mill Co., v. Consolidated Barb Wire Co.*, 32 Fed. 802.

"The doing of a single act of business, such as contracting in one state to sell and deliver there, machinery, to be manufactured in the home state, with no purpose to do any other business, or to have a place of business, does not constitute doing business within such state." 8 *Am. & Eng. Ency. Law* (1 Ed.), p. 346; 8 *Am. & Eng. Corp. Cases*, 178, 113 U. S. 127.

On pages 347-8 in 8 *Am. & Eng. Ency. Law*, in reference to what does not constitute doing business, the text enumerates several things among which is the following: "The making of occasional purchases either



by correspondence or the sending of an agent for that purpose."

Isolated transaction—General rule. The general conclusion of the courts is that isolated transactions, commercial or otherwise, taking place between a foreign corporation domiciled in one state and citizens of another state, are not a doing or carrying on of business by the foreign corporation within the state of the latter, even according to the weight of authority, when the transaction is of such a character as to constitute a part of the ordinary business of the corporation. 19 Cyc., p. 1268, citing numerous authorities from Alabama, Arkansas, Colorado, Illinois, Indian Territory, Iowa, Kansas, Missouri, New Jersey, New York, Oregon and Pennsylvania, Tennessee, Texas, Washington, Wisconsin, and United States. These authorities seem to be conclusive of the question under discussion.

In Haring's Corporate Interstate Commerce, published in 1917, section 593, it is said: "The mere making of a contract in the state of New York is not doing business within the state so as to preclude a foreign corporation which has not complied with New York law from bringing suit upon such contract in that state," and in section 594 the same author says: "A foreign corporation which has no capital employed nor goods stored nor branch office within the state of New York, although soliciting and taking orders there by traveling salesmen, is not doing business within the state, so as to require compliance with the New York corporation laws before an action can be maintained."

To the same effect is the case of *Saxony Mills v. Wagner et al.*, 94 Miss. 233. Appellee relied for his defense upon the case of *Music Co. v. Haygood*, 108 Miss. 764. There is a very wide difference between the facts of the case at bar and the case cited, *supra*. In the case cited the Music Company, a foreign corporation, who was plaintiff, had and maintained a store or office

in Tupelo, Mississippi; had a resident agent there who sold and delivered goods replenishing his stock from time to time, and was clearly doing business in this state. There is no similarity in the two cases. In the case at bar appellant sent its employee out to purchase cotton seed for the purpose of having them shipped to its mill in Birmingham to be converted into oil, meal, linter, etc., this employee not being a resident of this state and having no office or place of business and remaining only a few hours. Any purchase of seed made by him was subject to ratification at the home office, and in the instant case was so ratified. I call attention of the court to the case of *Standard Pattern Co. v. Cummins*, 187 Mich. 196.

If it can be said that the facts of this case constitutes doing business in Mississippi, within the purview of our statute, then was the transaction one of interstate commerce and not subject to regulation or restriction by our statute? What is interstate commerce? Justice FIELD in the case of *Mobile County v. Kimball*, 102 U. S. 691, 26 Law Ed. 238, says: "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities." "Action upon by separate states is not therefore permissible."

Again in *Bloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204, it is said: "Commerce among the states consists of intercourse and traffic between their citizens and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to prescribe the rules by which it shall be governed—that is, the conditions upon which it shall be conducted is vested in Congress. The power also embraces within its control all the instrumentali-

ties by which that commerce may be carried on and the means by which it may be aided and encouraged."

Mr. Pomeroy in his work on constitutional law defining interstate commerce says: "It includes the fact of intercourse and traffic and the subject-matter of intercourse and traffic. The fact of intercourse and traffic again embraces all the means, instruments and places in which intercourse and traffic are carried on. The subject-matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons."

In view of the foregoing definitions I presume it will not be contended that the purchase of cotton seed from appellee by appellant, was not a transaction of interstate commerce, if the purpose and understanding was that the seed were to be delivered on board the cars for the purpose of transportation to Birmingham, Alabama. While the memorandum of the contract does not specifically state that the seed were to be transported to Alabama, it is clear that it was the purpose and so understood by both parties that they were to be transported.

It is not necessary in the contract of sale that it should be specifically stated that the commodity is to be transported, but it may be inferred from the circumstances, the situation of the parties, the object of the sale and purchase, etc.

In *United States v. Tucker*, 188 Fed. 741, the court says: "A sale the parties to which are in different states, when such sale necessarily involves the transportation of goods, is a transaction of interstate commerce." Haring, *Corporate Interstate Commerce*, p. 9. When goods are delivered to a common carrier for transportation from one state to another, they become the object of Interstate Commerce. Haring *Corporate Interstate Commerce*, sec. 10; *Coe v. Errol*, 116 U. S. 517. So when the contract calls for delivery to a common carrier the same rule applies.

In *McNaughton Co. v. McGirl*, a Montana case, reported in 38 L. R. A. 367, the court reviews the authori-

ties at length upon the subject of interstate commerce, and I respectfully refer the court to that case and also to the case of *Standard Pattern Co. v. Cummins*, 187 Mich. 191.

In the latter case the court uses this language: So long as the business of the plaintiff, a foreign corporation was limited to the acts of interstate commerce, and did not establish a local agency, to represent it, it was not amenable to the laws of this state requiring foreign corporations, as a condition of transacting business in this state, to file a copy of their charter or articles of association as prescribed by the Michigan Act." Again the court says: "Was the plaintiff engaged in carrying on a local business?" and proceeds to answer that it was not.

This is the crucial test, and that which differentiates intrastate from interstate transactions. To be intrastate it must be a local business carried on by a local agency and must be the ordinary business of the corporation and not a mere incident to the business.

*F. H. Montgomery*, for appellee.

Can it be said that the coming into the state by this foreign corporation, and purchasing from the producers in the state, and bartering with the producers in the state, for their products on this immense scale, does not constitute "doing business" in the state? The inquiry answers itself.

Counsel for appellant undertakes to differentiate the case of *Quartet Music Company v. Haygood*, 108 Miss. 755, from the case at bar. It is difficult for me to see any distinction on principle between these cases. In the *Quartet Music Company* case the appellant had goods in Mississippi for sale, whereas in the case at bar the appellant came into Mississippi for the purpose of purchasing. The buying of goods constitutes a "doing

of business" as effectually as the selling of goods, and if the selling of goods in the regular course of business in Mississippi constituted a "doing of business" within the meaning of section 935 of the Code of 1906, I can see no reason why the coming into the state and going into the open markets and purchasing between four and five thousand tons of cotton seed during a season does not likewise constitute a "doing of business." So far as the magnitude of the business done is concerned, I apprehend that the amount invested in business by the Quartet Music Company was a mere picayune as compared with the amount invested by the Union Cotton Oil Company in this case.

I therefore confidently rely upon the decision of this court in *Quartet Music Company v. Haygood*, *supra*, as decisive of the first question raised by the appellant, namely, whether or not the Union Cotton Company was doing business in Mississippi within the meaning of section 935 of the Code of 1906.

The case of *Standard Pattern Company v. Cummings*, 187 Mich., 196, 153 N. W. 814, L. R. A. 1916F., page 329, cited by counsel for appellant is no authority against the convention of the appellee in this case. The facts in that case are very different from every viewpoint from the facts in this case. I especially call the attention of the court to the very copious notes appended to the report of this decision as found in L. R. A. 1916F.

It is very clear that the contract sued on in this case was made while the appellant was acting in plain violation of section 935 of the Code of 1906, and being so made the courts of this state will refuse to render any aid to the enforcement thereof.

I now come to a discussion of the second proposition raised by counsel for appellant. Was it a matter involving interstate commerce? It seems that the contract sued on in this case is a sufficient answer to this contention of appellant. This contract appears on page

8 of the record. By the terms of this contract the appellee was obligated to sell fifty tons of sound, dry, cotton seed to the appellant at forty-nine dollars per ton delivered at Como, Mississippi. The contract so far as the appellee is concerned was to be entirely completed when he delivered to the appellant the fifty tons of cotton seed at Como, Mississippi. Appellant contends that while the contract does not so state, it was the purpose of appellant to have these seed, when so delivered to it at Como, transported by railroad to its mill at Birmingham, Alabama. If this was the intention of the appellant it was a secret one not made known to the appellee, not consented to by the appellee, and not made a part of his contract; the transaction was to be a completed one upon the delivery of the cotton seed to the appellant at Como. After appellee had made his delivery, the seed were entirely within the control of the appellant and the seed were then to be transported by railway to Birmingham, Alabama. That was a pure matter of contract between the appellant and the railroad company not affecting in any degree the contractual rights of the appellee under the contract sued on. It was a contract made in Mississippi and to be wholly performed in Mississippi and I cannot see how any question of interstate commerce can arise on this contract between the appellant and the appellee.

Counsel in his brief has quoted many excellent definitions by eminent courts and authorities of "interstate commerce" with none of which I have any fault to find. But in my judgment these authorities are without application to the facts in this case.

There is nothing in the contract to indicate that any question of commerce is involved, either interstate or intrastate, and the suggestion that the seed when delivered were to be transported to Birmingham, Alabama, arises solely from explanation made by the appellant long after the entering into the contract and not participated in by the appellee.

If the act of the appellee in delivering the cotton seed to the railroad station under the contract in this case constituted an act of interstate commerce, then every farmer and planter who should bring a bale of cotton to the market and deliver it to the purchaser on the cotton platform at the railroad station, which is a general if not a universal custom, which the purchaser afterwards ships to a foreign state is likewise engaged in an act of interstate commerce and the legislature of the state would be without power to enact a statute governing the rights of the parties to such a transaction.

Likewise, every farmer or planter who sells his corn or grain or cotton seed to be delivered by him to the purchaser at the railroad station which was to be shipped by the purchaser to a foreign state would be engaged in an act of interstate commerce and the courts would be driven to the Constitution of the United States and the Acts of Congress to ascertain the contractual rights of the parties to every such transaction. Such a condition as this is unthinkable.

The contract in this case was made by parties in Mississippi and was to be completed in Mississippi and a delivery in Como to the railway station was a delivery to the appellant. There is nothing in the record from beginning to end which states any facts which by any construction could constitute an act of interstate commerce except the subsequent explanation of the appellant of his secret intention to transport these seed to Birmingham to be crushed at its mill. This was appellant's privilege but in no sense imposed any obligation upon the appellee. Contracts are construed according to their language and parties are not permitted to vary and add to the terms of their written contracts, especially after being involved in litigation.

So far as I can see, no authority cited by the appellant in this case holds that the fulfillment of the contract

sued on in this case constituted an act of interstate commerce.

The contract was made at Como, signed by the parties at Como and was to be completed at Como; no question of interstate commerce can be involved in such a contract.

ETHRIDGE, J., delivered the opinion of the court.

A. M. Patterson & Co. and the Union Cotton Oil Company, a corporation under the laws of Alabama and domiciled at Birmingham, Alabama, entered into a contract on the 5th day of October, 1916, in the following words:

"Union Cotton Oil Company, Birmingham, Alabama. Bill of Sale. Como, Mississippi, 10/5/1916. We hereby sell to Union Cotton Oil Company fifty tons of sound dry cotton seed, to be shipped on or before October 25th, 1916, at price of forty-nine dollars per ton f. o. b. cars at Como, Mississippi, mill weights to govern in settlement. A. M. Patterson & Co., by A. M. Patterson.

"Accepted: Union Cotton Oil Company, by J. H. Hendon."

Patterson & Co. failed to deliver the seed called for in this contract, and the Union Cotton Oil Company went into the market and purchased the seed at an advanced price, the price of seed having gone up considerably between the date of the purchase under the above contract and the date on which the cotton seed were purchased in December by the Cotton Oil Company, the damage according to the declaration amounting to seven hundred dollars. The defendant pleaded the general issue, and pleaded specially that plaintiff could not enforce his contract because it was a nonresident corporation, and that its charter had not been filed with the secretary of state and the filing fee required paid to the secretary of state under section 935 of the Code of 1906. It also gave notice under the general issue that he received a letter from the plaintiff dated



October 9, 1916, in which plaintiff wrote the defendant that it would be all right to delay shipping the seed contracted for for several days, as plaintiff was crowded for room and could use the seed a little later, and that on October 13th the defendant wrote the plaintiff that he was also crowded for room, and he already had the seed contracted for, and unless he was permitted to ship during the week, he would be forced to sell the seed to some one who could receive them at once, and that he never received any reply or further instruction from the plaintiff, and treated the silence of the plaintiff as a refusal to accept the seed, and sold the seed to another party. The plaintiff's proof showed that it was a corporation domiciled at Birmingham, Alabama, created under the laws thereof, and that it had never filed its charter in the state of Mississippi, and that the only way that it did any business in Mississippi was to send a traveling representative, who bought seed from seed dealers to be shipped to Birmingham, and that it required the consent and affirmance of the corporation at Birmingham to make a sale to it, as the salesman had no power to complete a contract; that it had no local agency or office in the state of Mississippi, and it had no plant and did no crushing in the state of Mississippi. It also showed that the plaintiff never received this letter above referred to. Upon this evidence the court below granted a peremptory instruction against the plaintiff. The record shows that the circuit judge granted the peremptory instruction upon the theory that the above contract constituted a Mississippi contract, and that the failure to file the charter made such contract illegal and unenforceable in the courts of this state. We are unable to agree with the circuit judge in this contention. The contract showed on its face that the plaintiff was doing business at Birmingham, Alabama, and that the fifty tons of cotton seed were to be shipped and were to be settled for by mill weights. While it is true they were to be paid for f. o. b. Como,

still that does not take it out of the class of interstate transactions. It merely devolved upon the plaintiff to pay in addition to the price stipulated for, whatever freight charges might accrue. The contract could not be completed until accepted by the corporation under the proof in this record; and, as the mill weights were to govern, it is manifest that the cotton seed had to be shipped to the mill in order that the weight should be determined. This shipment would necessarily be an interstate transaction. See *Saxony Mills v. Wagner*, 94 Miss. 233, 47 So. 899, 23 L. R. A. (N. S.) 834, 19 Ann. Cas. 199; *MacNaughton Co. v. McGirl*, 38 L. R. A. 367, note; *Standard Fashion Co. v. Cummings*, 187 Mich. 196, 153 N. W. 814, L. R. A. 1916F, 329, note, Ann. Cas. 1916E, 413.

Judgment of the court below is accordingly reversed, and the cause remanded.

*Reversed and remanded.*

---

### HORTON v. LINCOLN COUNTY.

[77 South. 796, Division B.]

1. ANIMALS. *Tick eradication. Death of animals. Liability. Laws - 1914, chapter 222. Construction.*

Laws 1914, chapter 222, providing for the dipping of cattle to eradicate ticks, and authorizing the board of supervisors on satisfactory proof to pay for damages suffered by the owner of the cattle in the process of dipping, is not a statute creating an absolute liability against the county, but is an enabling statute to authorize the board to pay such claims in any amount they may consider to be proper for such injury within the limits prescribed by the statute and when the board of supervisors disallow such claims the owner cannot recover from the county.

2. PLEADINGS. *Conclusions. Negligence.*

In a suit for damages caused by negligence it is not sufficient to allege negligence as a mere conclusion or inference. Facts must be pleaded showing negligence.

APPEAL from the circuit court of Lincoln county.

HON. D. M. MILLER, Judge.

Suit by A. N. Horton against Lincoln county. From a judgment sustaining a demurrer to the declaration, plaintiff appeals.

The facts are fully stated in the opinion of the court.

*Jas. F. Noble*, for appellant.

The circuit judge committed error in sustaining the demurrer to the declaration. Chapter 222 of the Acts of the Mississippi legislature of 1914, clearly authorizes the board of supervisors to pay a claim of this nature. The word "may" in this law is properly interpreted "must." A regular and honest claim of this kind must be paid by the board of supervisors. The declaration in this case is lacking in no essential allegation to bring appellant's claim within the requirements of the statute. The circuit judge held that the board of supervisors have arbitrary power to pay or not pay a perfectly regular and truthful claim of this nature. I deny the correctness of the learned judge's ruling. I insist that a claimant, whose honest claim has been rejected by the board, has the legal right to go to the courts for protection. I refer the court to following decisions regarding the meaning of "may." *Smalley v. Paine*, 102 Tex. 304; *Montgomery v. Henry*, 144 Ala. 629; *Henry v. State*, 87 Miss. 1; *Trial v. Trial*, 56 W. Va. 594; 105 Mo. App. 98, 95 S. W. 98; 95 N. E. 400.

It would be very unwise to vest the board of supervisors with arbitrary power in this matter. It would give free rein to the board to do exactly as it pleased, to do right or wrong, show partiality, punish an enemy or reward a friend, even as in the instant case, reject a perfectly honest claim. The law certainly is that a dissatisfied claimant has the legal right to take his cause of complaint to a jury for hearing and determi-

nation, where, under the direction of the court, justice and right are more likely to prevail.

I really think that the "due process" clause of the National Constitution would be violated if it should be held that the owner of cattle injured or killed as a result of being dipped has no recourse against the county for compensation for his loss.

When chapter 222 of the Acts 1914, was enacted, a liability was imposed on the board of supervisors to pay every genuine claim of owners of cattle injured or killed in the process of being dipped. It is in legal contemplation an indebtedness due by the county to said owners.

Section 4627 of the Code of 1906, authorizes the board of supervisors to pay teachers indebtedness due for teaching, and states they may pay the indebtedness if they believe it is right and proper. I contend that chapter 222 and section 4627 are to be construed exactly alike; that "may" means "must" in each law; that the board of supervisors "must" pay the owner for injuries done his cattle as it also "must" pay the teacher. *Hebron Bank v. Lawrence County*, 109 Miss. 397, holds that "may" in section 4627 means "must." I insist that the phraseology and substantial meaning of both statutes are virtually identical in regard to the payment of the claims. I ask that the court read these two statutes together, in the light of the decision just quoted, and I feel confident that when this is done, my contention will be adopted as correct. I also refer the court to 11 Cyc., 594, near the end of paragraph C., which holds, as I understand, that when the legislature authorizes a county board to pay a claim of this nature, it is mandatory.

I am sure it is right for claims like this one to be paid. The owner of cattle have to dip; if they refuse, they violate the law, commit crime. They must subject their property to known danger, without their permission or

consent; then, surely when they suffer loss, they should receive just compensation. I ask in all earnestness that this case be reversed and appellant given the right to place his cause before a jury for determination. I submit the case confident in the belief that this court will see the wisdom and righteousness in reversing the lower court and permitting appellant to take his cause of complaint to a jury of his peers, where justice and right may be confidently expected.

*Frank Roberson*, for appellee.

Chapter 167, of the Laws of 1916, is commonly known as "the state-wide tick eradication law," and I assume that the cow killed in the instant case was dipped pursuant to the state-wide law.

I call the court's attention to the fact that there is no provision in chapter 167, of the Laws of 1916, for the compensation of the owners of cattle killed or permanently injured in the process of dipping. However, the attorney-general's office has held that chapter 222, of the Laws of 1914, which provides for the compensation of owners for cattle killed or permanently injured in the process of dipping, was not superseded by the state-wide tick eradication law, but that the 1914 Act is still in force and the board of supervisors, in their discretion, have the authority to pay for such damages even though the dipping was done under the state-wide act and not by the local option act which was in force prior to 1916. The attorney-general's office has held many times that chapter 222, Laws of 1914, made it discretionary with the board of supervisors as to whether compensation should be made. I call the court's attention, to chapter 221, Laws of 1914, which provides that the inspector, under whose supervision the dipping of cattle is done, is under a bond of two thousand dollars conditioned upon the faithful perfor-

mance of his duties. Section 2, of this act specifically provides that such inspector shall be civilly liable on his official bond for any damages to cattle or other live stock resulting from his negligence or incompetency. The appellant, in the instant case, had ample recourse against the bonded agent of the county for the damage caused by his negligence as alleged in appellant's declaration.

Counsel for appellant, in his brief, cites several authorities on the proposition that the word, "may" is sometimes interpreted as "must." Of course, the determination as to whether the word, "may" shall be interpreted as "must" will depend upon the particular statute itself, and I don't know that a decision on another statute throws any helpful light on the statute in question. The history of the statute in question should afford assistance in the interpretation of chapter 222 of the Laws of 1914.

The case of *Hebron Bank v. Lawrence County*, 109, Miss. 394, construing section 4627, of the Code of 1906, is cited by the counsel for appellant. He contends that because the court decided that the word, "may" in that section meant "must" that it logically follows that the same words should receive the same interpretation in the present statute. I have no fault to find with that feature of the Hebron Bank decision, but I feel quiet sure that even in that case, section 4628 was not called to the attention of the court. In the Hebron Bank case, section 4627 could not have been available until the official bond of the county superintendent of education had been exhausted under section 4628. Be that as it may, I submit that the interpretation of the words, "may" and "must" in that case is of no assistance in the present instance.

This is equally true of the case of *Town of Carrollton v. Town of North Carrollton*, 109 Miss. 494, cited in the additional brief of counsel for appellant.

Both of those cases sound in *ex contractu*, whereas the case at bar is necessarily one sounding in tort. This distinction is very vital as I see it. Our court has held many times that the county is not responsible for the tortious act of its agents. *Sutton and Dudley v. Board of Supervisors, of Carroll County*, 41 Miss. 236; *Branham v. Board of Supervisors*, 54 Miss. 363. This is the common law and has not been changed by statute. It is a mere gratuitous action on the part of the state to compensate owners for damages arising in the protection of the health of the public under its police power.

It was held, in *New Orleans v. Charonleau*, 46 So. 911, 18 L. R. A. (N. S.) 368, that diseased cows might be destroyed as a police regulation without making compensation to the owner. See also, *Huston v. State*, 98 Wis. 48, 74 N. W. 111; 42 L. R. A. 39; 28 Am. Rep. 352.

In *Ross v. Denshaw Levee Board*, 83 Ark. 178, 103 S. W. 380, 21 L. R. A. (N. S.) 699, it was held that a statute authorizing the killing of hogs running at large on levees without making compensation to the owners was valid under the police powers of the state. So it follows that the appellant had no constitutional right of compensation.

It is contended by counsel for appellant that chapter 38 passed at the extraordinary session of the legislature of 1917, making it mandatory upon the board of supervisors to compensate owners for cattle killed, is a legislative interpretation of chapter 222, of the Laws of 1914. I think the converse is true. I have investigated the original house journal as to the passage of this statute, which was known as Senate Bill 22, and find that it received an unfavorable report from the judiciary committee and was brought up on a minority report. It is fair to presume that the minority report gives the real reason and true history as to the passage of this act. The minority report contained the following reasons for its passage: "We believe it to be a

meritorious measure, and one that is fair and right to any person having a claim against the county."

There is not even a suggestion that it was the original intention of the legislature to make the compensation to owners mandatory upon the board of supervisors, but the only reasonable inference that can be drawn is that the act passed in 1917, was intended by the legislature to afford a substantial right not heretofore given by the legislature. This bill seems to have passed the house by a narrow majority, having received a vote of seventy-one yeas and fifty-six nays.

In conclusion, I submit that this case should be affirmed because the action is based on tort and a county cannot be sued for the tortious acts of its agents. Furthermore, there is no injustice done to the cattle owners, since he has an ample remedy under chapter 221, Laws of 1914, against the bonded inspector and his sureties.

ETHRIDGE, J., delivered the opinion of the court.

A. N. Horton, a citizen of Lincoln county, filed a suit in the justice court of district 1 of said county against the board of supervisors for damages for dipping a cow in April, 1917. The declaration is in the following words:

"Comes plaintiff, resident citizen of Lincoln county, Miss., and complains of Lincoln county, and states the cause of action: That in April, 1917, he was compelled under the law of the state of Mississippi to dip a cow. That when the cow was dipped, she got some of the mixture in which she was dipped in her mouth and swallowed it, which caused her death in a few days thereafter. Said cow being the property of this plaintiff. That the drinking and the swallowing of the said mixture was due to the negligence and carelessness of the inspector under whose direction the said cow was dipped. Said inspector was duly appointed as provided



by law. Said claim was properly filed before the board of supervisors of Lincoln county, Mississippi, in accordance with law, and was by said board disallowed. That the cow was a valuable one, and was worth fifty-five dollars. Plaintiff, therefore, sues and demands judgment for the sum of fifty-five dollars and all cost of this suit."

The judgment of the justice court was for the plaintiff, and was appealed to the circuit court. In the circuit court the county interposed a demurrer on the following grounds: First, the declaration states no cause of action; second, the plaintiff cannot recover in this case because the county is not liable as a matter of law; and, third, the matter of payment of cattle injured or killed by dipping is discretionary with the board of supervisors, and the claim shows on its face that the board of supervisors had disallowed it, and the claim cannot be sustained. The court below sustained the demurrer, and the plaintiff appeals here.

The plaintiff relies upon chapter 222 of the Laws of 1914. Section 1 of this act provides that the board of supervisors of any county in this state in which the dipping of cattle for the eradication of the cattle tick has been conducted under the authority of the board of supervisors, and in cases where cattle are hereafter dipped under the authority of the board, is authorized to pay out of the general funds of such county to the owner of cattle such loss or damage as may have been suffered by such owner because of the death or permanent injury to such cattle in the process of dipping, provided, that any one claim shall not exceed one hundred dollars. Section 2 is in the following words:

"That any owner of cattle making a claim for the death or injury of his cattle under this law shall make proof of the amount of his loss or damage to the board of supervisors, to the satisfaction of the said board of

supervisors. And when proof has been made or submitted to the board that is satisfactory to it that the owner of cattle has suffered loss or damage because of the death or permanent injury of his cattle in the process of dipping, or as the result of dipping, the board may allow to such owner such fair and reasonable damages as in the judgment and discretion of the board will compensate him for his loss or damage."

We think this statute is not a statute creating an absolute liability against the county, but is an enabling statute to authorize the board of supervisors to pay such claims in any amount they may consider to be proper for such injury. The very terms of section 2 of the act provide that the proof must be to the satisfaction of the board of supervisors, and that when proof has been made and submitted to the board that is satisfactory to it, the board may allow such claimant such fair and reasonable damage as in the judgment and discretion of the board will compensate him for his loss or damage. We think this statute was passed for the purpose of preventing so many local bills being introduced to enable the board to pay in their discretion certain persons for cattle dipped. This conclusion is strengthened by the fact that chapter 221 of the Laws of 1914 requires the inspectors and other officers appointed to conduct the inspection and dipping of cattle to give bond in the sum of two thousand dollars, conditioned for the faithful performance of their duties, and providing that such inspectors or other officers shall be civilly liable on his official bond for any damages to cattle or other live stock resulting from his negligence or incompetency.

We are further of the opinion that the declaration does not charge any fact from which incompetency or neglect can legally be determined. It is not sufficient to allege negligence as a mere conclusion or inference.

Facts must be pleaded showing negligence. But as we do not think the county is liable, this feature is not material here. It should be noted further that the legislature in 1916 passed a state-wide tick eradication law, in which all discretion was removed from the board of supervisors as to whether dipping would be conducted or not. The circuit court having reached the same conclusions, the judgment will be affirmed.

*Affirmed.*

HARTFORD FIRE INS. CO. v. J. R. BUCKWALTER LUMBER CO.

[77 South. 798, Division A.]

1. **INSURANCE. Mortgage clause. Oral contract to substitute.**

An oral contract of renewal of insurance by an agent who has authority to write policies is valid and binding and an oral contract to substitute a mortgage clause in a policy is also good, since the mortgage clause is no more sacred nor formal an instrument than the insurance policy itself.

2. **SAME.**

Where there is no clause in the policy providing that an insured must consent to the substitution of a mortgage clause and such substitution would not affect the interest of insured, it is not necessary to obtain the consent of insured to such substitution.

3. **INSURANCE. Oral mortgage clause. Code 1906, section 2596.**

Under Code 1906, section 2596, providing that every fire insurance policy taken out by a mortgagor or grantor in a deed of trust shall have attached a mortgage clause in substantially the form set out in the section, there is no provision prohibiting any oral agreement to issue a mortgage clause, when this oral agreement is made, the statute simply defines what the clause is. To that extent it becomes a statutory insurance policy.

4. **SAME.**

No additional consideration is required to be paid as a condition for the insertion of a mortgage clause the consideration paid by the original insurer constitutes a sufficient and valuable consideration for the contract between the insurance company and the mortgagee, since it imposes no increased hazard.

116 Miss.]

Brief for appellant.

**5. INSURANCE. *Validity of policy. Estoppel.***

Where the general agent of the defendant insurance company, who had authority to do so, stated that a fire policy was effective as to plaintiff's interest, and that he would make out the necessary mortgage clause, he thereby waived the actual writing of the mortgage clause and in such case the insurance company was estopped to make any of these contentions.

**6. MORTGAGES. *Extinguishment.***

If it be the intention of parties in purchasing a prior deed of trust on property, upon which they have some claim to keep the prior mortgage or deed of trust alive, then this intention should govern.

APPEAL from the circuit court of Newton county.

HON. J. D. CARR, Judge.

Suit by J. R. Buckwalter Lumber Company against the Hartford Fire Insurance Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

*McLaurin & Arminstead*, for appellant.

It is respectfully submitted that this suit must fail for the reason that no recovery can be had on the first count of the declaration, as no proof was offered to sustain that count; and no recovery can be had on the second count of the declaration, because there was no specific agreement shown in the evidence, on which to bind the insurance company; (appellant here), and further, that there is no allegation in the pleadings, and no fact in the proof, of any payment, or tender of premium, offered to the insurance company to bind it on the alleged agreement set forth in the second count in the declaration.

By reference to Cooley's Briefs on Insurance volume 1, p. 464, it is held that: "In an action for breach of an oral contract to insure, the plaintiff must allege and prove payment or tender of the premium before he can recover, and if an action to recover damages for a breach of a promise to renew a policy, a declaration

which fails to allege that insured left the premium with the insurer's agent, or that, at the expiration of the policy, it was paid or tendered, is demurrable," citing *Croghan v. N. Y. Underwriters Agency*, 53 Ga. 109; *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840; *Jones v. United States*, 96 U. S. 24-28; *The Tornado*, 108 U. S. 342-251; *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551-559; *Milling Co. v. Langford*, 81 Miss. 728.

In 2 Clements on Fire Insurance, p. 593, Rule 51, it is said: "The burden of proof is on the insured, who alleges the existence of a parol contract, to show by satisfactory evidence that the negotiations were concluded and contract in fact made, by which the parties became mutually bound; and an infallible test is to determine whether both parties are bound, unless the assured is obligated to pay the premium, on a tender of the policy. the company is not to deliver it or to pay the loss, if one occurs. When the insured is not bound to pay the premium, the company cannot be bound to pay the loss." Citing *J. R. Davis Lumber Co. v. Scottish Union & N. Ins. Co.*, 94 Wis. 472, 69 N. W. 156; *Waldron v. Home Mutual Ins. Co.*, 9 Wash. 534, 38 Pac. 136.

So we say that if there be no consideration alleged or shown for the breach of the alleged contract to put a new mortgage clause on a policy that had become void, there was no binding obligation on the part of the insurance company to do so even according to the appellee's own proof in the court below, and the court erred in allowing any judgment to be rendered against the appellant (defendant below), and should have granted the instruction for the jury to find a verdict for the appellant. These considerations are covered by assignment of errors numbers 18, 19, and 20, filed in this case.

Assignment of errors numbers 21 and 22, we submit, are well taken, also, for the reason that when the J. R. Buckwalter Lumber Company foreclosed its second mortgage on the property covered by the policy and

paid off the mortgage to the Pan-American Life Insurance Company to clear its title it operated to extinguish the debt of the Pan-American Life Insurance Company, otherwise the Buckwalter Lumber Company, owning the title to the property subject to the Pan-American Life Insurance Company's mortgage, by taking the assignment of a mortgage on his own property, would thereby become its own creditor. This could hardly be.

We insist that when Mr. Buckwalter became the owner of the mortgage covering the property, and paid off the prior mortgage, it was the extinguishment of the debt, and he had no right to claim any contract whether void or not, to cover an extinguished debt.

The contentions set forth in the foregoing brief are set up in the assignment of errors and it is respectfully submitted that the trial of this case in the lower court both on the facts and the law was erroneous.

The court will observe that this is not a case where a policy had actually been delivered to an assured, and credit given for the premium by agreement made between the parties at the time; but this suit is for a breach of a contract to attach a mortgage clause to a policy already avoided by its terms, and to impose a liability upon the insurance company without showing any consideration therefor whatever or any benefit passing to the insurance company, for the assumption, of the alleged liability, by breach of the alleged contract, to change mortgagees, on a void policy, without the consent of the assured. Surely there can be no liability under such circumstances.

Where a declaration fails to state a cause of action as in the case at bar, the defect may be reached by a peremptory instruction asked by the defendant at the close of the evidence, and a failure to demur, is not a waiver of the defect. *Southern Ry. v. Grace*, 95 Miss. 611-616. All of which is respectfully submitted.

*J. N. Flowers*, for appellee.

Every contention made by counsel might be met if necessary by simply calling to the court's attention the proof made by the plaintiff in the court below to the effect that all the facts about these papers and the *status* of the title to this property were made known to Mr. Cole, the agent of the company, as soon as the papers got into the hands of Buckwalter, and his agent, with all the facts before him, agreed and promised to do the things necessary to protect Buckwalter under this policy.

Buckwalter relied upon this. It is too late now for the defendant, this appellant, to say that the policy had been forfeited and that the agreement should not have been made. But defendant is estopped. Buckwalter relied upon the representations, acted upon them, took no other steps to get insurance, depended absolutely upon what Cole told him. Cole assured him that this particular policy in his hands protected him and that he had done the necessary things to make this policy protect him.

Rules of law applicable. The burden is upon the defendant to prove the breach of a condition subsequent. He must plead it and then prove it. To support this statement of the law it needs only to refer to the extensive note to *Benanti v. Delaware Insurance Company* (Conn. 1912), beginning at page 829, of American Annotated Cases, 1913D. The cases listed in that note represent the courts of England, Ireland, Canada, United States, Alabama, Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi (*Liverpool & London & Globe Insurance Company v. Foxworth Lumber Company*, 72 Miss. 555, 17 So. 445), Missouri, Nebraska, New Jersey, Ohio, Oklahoma, Pennsylvania, South

Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia and Wisconsin.

Since this is so nearly unanimous and our own state is included, we will treat this as being a settled rule to be applied in the present case for what it may be worth.

The burden is placed upon the defendant not only as to proof of breaches due to acts committed or conditions arising after the policy issues. The rule also applies when the clause affirming the title of the insured to be not other than unconditional and sole ownership at the time the policy issued is depended upon. *Atlas Fire Insurance Company v. Malone* (Ark. 1911), American Ann. Cases. 1913B, p. 210, and note, page 212; *Boulden v. Phoenix Insurance Company*, 112 Ala. 422, 20 So. 587; *Connecticut Fire Insurance Company v. Colorado, etc., Co.* (Colo.), Am. Ann. Cases, 1912C, p. 597; *Insurance Co. v. Bonnen*, 57 Miss. 308.

The presence of a mortgage or other lien on the property is not inconsistent with sole and unconditional ownership. *Boulden v. Phoenix Fire Insurance Company*, 112 Ala. 422, 20 So. 587; *Atlas Fire Insurance Company v. Malone* (Ark.), Am. Ann. Cases, 1913B., p. 210; *Connecticut Fire Insurance Company v. Colorado, etc., Co.* (Colo.), Am. Ann. Cases, 1912C, p. 597.

The change of title depended upon to support a forfeiture must be real and effective. A void conveyance is not sufficient. There must be a valid transfer of the title. *West Branch Ins. Co. v. Helfenstein*, 40 Pa. 280; *Courtney v. N. Y. City Ins. Co.*, 28 Barb. 116; *Folsom v. Bellnap, etc., Co.*, 30 N. H. 231; *Orrell v. Hampton, etc., Co.*, 13 Gray 431; *Washington Ins. Co. v. Hayes*, 17 Ohio St. 423; *Ayers v. Home Ins. Co.*, 21 Iowa 185; *Bryon v. Traders F. Ins. Co.*, 145 Mass. 389; *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 490, 32 N. E. 914, 19 L. R. A. 114.



A voidable sale by the trustee in a trust deed does not constitute a change of title. *Commercial Union Assur. Co. v. Scammon*, 126 Ill. 355, 18 N. E. 562, 9 A. S. R. 607; *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 490, 32 N. E. 914, 36 A. S. R. 432, 19 L. R. A. 114.

In the case last cited the court said: "The right to insist upon a forfeiture under a clause against alienation or change of title is *strictissimi juris*, and such right must be brought clearly within the forfeiting clause, *Aurora F. Ins. Co. v. Eddy*, 55 Ill. 213, such a clause is couched in language of the insurance company's own selection and its tendency is to narrow and limit the obligation of the company, and defeat the indemnity which it was the purpose of the assured to obtain. The burden of proof was upon appellant to establish that there had been a change of title that was valid as against the insured. This it did not do. The sale that appears in the record was made without the consent of Scammon, and he expressly repudiated it, and remained in possession of the premises, claiming to be owner. The sale, without a ratification of it by Scammon, was invalid and he never ratified it by acquiescence or otherwise."

The courts are practically agreed that placing a mortgage on property is not an alienation or change of title prohibited by the provision against alienation. *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418, 34 Am. Dec. 69, and note; *Loy v. Home Insurance Co.*, 24 Minn. 315, 31 Am. Rep. 346; *Byers v. Farmers' Insurance Company*, 35 Ohio St. 606, 35 Am. Rep. 623; *Sunfire Office v. Clark*, 53 Ohio St. 414, 42 N. E. 248, L. R. A. 562, and note; *Peck v. Hirard Fire, etc., Ins. Co.*, 16 Utah 121, 51 Pac. 255, 67 A. S. R. 600 (Deed intended as mortgage); *Hartford Steam-Boiler Inspection, etc., v. Lasher Stocking Company*, 66 Vt.

439, 29 Atl. 629, 44 A. S. R. 859; *Guarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

The burden of the proof rests upon the insurer to prove any facts or conditions depended upon to avoid the policy. *Thompson v. Bankers, etc., Ins. Co.* (Minn.), Am. Ann. Cases, 1916A, p. 277.

Forfeiture coming to knowledge of agent is waived and company is estopped to set it up when unearned premium is not returned. *Insurance Co. v. Dobbins*, 81 Miss. 623, 33 So. 504; 3 Cooley's Briefs, p. 2463, et seq; 3 Cooley's Briefs, page 2469.

It is respectfully submitted that the appellant has shown no ground for reversal and that the judgment of the lower court should be affirmed.

SYKES, J., delivered the opinion of the court.

Appellee, J. R. Buckwalter Lumber Company, filed suit in the circuit court of Newton county against appellant, Hartford Fire Insurance Company, to recover the sum of seven thousand dollars and interest, upon an insurance policy issued by the appellant, payable to Mrs. J. E. Golden, insuring a hotel building in the town of Union, Newton county, Miss. The policy contains the New York standard mortgage clause, making the loss or damage payable to the Pan-American Life Insurance Company. This mortgage clause is dated and was issued at the same time the policy was written, viz., April 2, 1915, for a period of one year. The property was burned on February 27, 1916. J. E. Golden, Jr., was the owner of the property on the 1st of January, 1913. On that day he executed a deed of trust on this property in favor of the Pan-American Life Insurance Company, to secure an indebtedness of seven thousand dollars. A short time thereafter Golden executed another deed of trust upon the same property to J. R. Buckwalter Lumber Company to secure an indebtedness

due it. At a later period, viz., on May 26, 1913, Golden executed a deed to his wife, conveying to her the property. The policy in suit was issued by J. M. Cole, agent of the appellant company at Union, Miss., and the premium paid therefor was two hundred and ten dollars. Upon its issuance the policy was delivered to the mortgagee, the Pan-American Life Insurance Company. In October, 1915, after Golden had deeded this property, or his title and equity in it, to his wife, Mrs. Golden, there was an attempted foreclosure sale of the same under the second deed of trust, the one of the J. R. Buckwalter Lumber Company, at which sale the appellee lumber company attempted to purchase it, subject, of course, to the prior or first deed of trust. The trustee's deed, after reciting that the trustee offered for sale the property, properly describing it, contains this clause:

"I therefore, as trustee, do hereby transfer, sell, and assign to the said J. R. Buckwalter Lumber Company, a corporation, all of the right, title, and interest of the said J. E. Golden, Jr., in and to said property."

At the time of this attempted trustee's sale, J. E. Golden, Jr., had already parted with whatever title or equity he possessed in the property, by deeding the same to his wife. It is therefore doubtful whether or not the purchaser at this trustee's sale obtained a valid title to the property, subject to the first mortgage. We are not called upon to pass upon this question, however, in this case. There seems to have been no change in the possession of the property after this attempted trustee's sale. On the 6th day of January, 1916, the appellee lumber company purchased the notes and security held by the Pan-American Life Insurance Company, and took a written assignment of the same, for which it paid a consideration of seven thousand, one hundred and eighty-nine dollars and forty-eight cents. When these papers and assignments were delivered to the appellee, the insurance policy in suit was delivered to it

also. This policy was not mentioned in the written assignment, nor was there any written assignment on the policy itself. While the appellee was negotiating for the purchase of the notes and securities held by the Pan-American Life Insurance Company, according to the testimony of its attorney, W. I. Munn, he called to see Mr. Cole, the agent of the insurance company, and explained to him that the appellee was about to purchase these notes and security, and asked him about this insurance. He testified that Mr. Cole told him "to go ahead, and that the insurance was all right, and that, if anything was to be done when the papers got here, he would fix it." Mr. Munn further testified that, as soon as the papers arrived, the insurance policy was turned over to him; that he took it to Mr. Cole, and asked him either to issue a new policy or to attach a mortgage clause in favor of appellee to this policy. Mr. Cole told him it would be too much trouble to issue a new policy, but that he would fix this one by issuing a mortgage clause in favor of the appellee; that it was all right, and that the policy was in force, and to notify the appellee to this effect. It will be noted that at this time the policy had four months to run before its expiration. Mr. J. R. Buckwalter, president of the appellee corporation, also testified that he discussed this insurance matter with Mr. Cole both before and after the fire, and was told by Mr. Cole at both times that the policy was all right and that he knew about the transaction. He also told him after the fire that there would be no trouble about collecting the insurance. Mr. Munn also testified that he explained in detail to Mr. Cole the various transactions relating to the title of this property. Mr. Cole denied having the conversations with Mr. Munn and Mr. Buckwalter. He did not deny, however, that he was familiar with the title to the property. The case was tried upon the second count of the declaration, which, in substance, set up the facts above enumerated.

A plea of the general issue was filed, and notice of certain matters was given by the defendant. It is unnecessary to set up in detail what the notice of defendant and the counternotice of plaintiff contained. A verdict and judgment were rendered in favor of the plaintiff for the amount sued for, from which judgment this appeal is prosecuted.

The appellant contends, first, that it should have been given a peremptory instruction in the lower court. It is contended that one mortgagee cannot be substituted for another on a valid insurance policy without the express consent of the insurance company. The consent of the insurance company in this case was obtained through its general agent, Mr. Cole, who had the right to and did, write policies, mortgage clauses, and renewals. It has several times been decided by this court that an oral contract of renewal by an agent who has authority to write policies is valid and binding. Since an oral contract of renewal is good, then it must follow that an oral contract to substitute a mortgage clause in a policy is perfectly good. The mortgage clause is no more sacred nor formal an instrument than the insurance policy itself.

It is further contended by the appellant that, before this agreement to substitute a mortgage clause could be valid, it would be necessary for the insured, Mrs. Golden, to have assented thereto. No authorities are cited by counsel directly deciding this proposition. The issuance of this mortgage clause would in no way affect any interest of Mrs. Golden, and we see no more reason why she should be consulted about this matter than that she should be consulted about the transfer and assignment of the notes and deed of trust. There is no clause in the policy providing that an insured must consent thereto.

It is contended that there was no contract entered into between the agent of the insurance company, Mr.

Cole, and Mr. Munn, about the issuance of the mortgage clause. The testimony, however, of Mr. Munn, is that the insurance agent agreed to issue a mortgage clause in favor of the appellee, and that he would keep the insurance in force. What this clause is was well understood by both Mr. Munn and the insurance agent. We think the agreement, therefore, was perfectly plain and unambiguous.

It is contended that no oral agreement can be made under the law of this state to attach a mortgage clause to a policy of insurance, for the reason that section 2596, Code of 1906 (section 5060, Hemingway's Code), sets forth the statutory mortgage clause. The meaning of this section is, simply, that this mortgage clause is written by the statute into every policy containing any clause making any of the proceeds of the policy payable to a mortgagee. There is nothing in it prohibiting any oral agreement to issue a mortgage clause. When this oral agreement is made, the statute simply defines what the clause is. To that extent it becomes a statutory insurance policy.

It is next contended that the agreement was void and unenforceable, because there was no consideration passing from the appellee to the insurance company therefor. This contention of appellant is settled adversely to it in the opinion of this court in the case of *Bacot v. Insurance Co.*, 96 Miss. 223, 50 So. 729, 25 L. R. A. (N. S.) 1226, Ann. Cas. 1912B, 262, in the following language:

"The consideration paid for the policy by the owner is a continuing consideration, day by day, and is not fully earned until the expiration of the full life of the insurance policy. That this is the case and is so understood by the insurance company is evidenced by the clause in the policy which permits either party to cancel the policy on certain conditions therein named, where-

upon it becomes the duty of the company to refund a certain proportion of the unearned premium. No additional consideration is required to be paid as a condition for the insertion of the mortgage clause in the insurance policy, nor is any additional risk incurred by the insurance company. The consideration paid by the original insurer constitutes a sufficient and valuable consideration for the contract between the insurance company and the mortgagee, since it imposes no increased hazard; nor does it increase the amount of the insurance contract, but merely imposes upon the insurance company the obligation of paying to the mortgagee, in the place of the insured and out of the proceeds of the policy, such sum, not in excess of the face value of the policy, as the interest of the mortgagee, in the identical thing insured, shall amount to."

We also quote from the same opinion as to the effect of section 2596, Code of 1906 (section 5060, Hemingway's Code), with reference to a mortgage clause in a policy of insurance:

"When a mortgage clause is inserted in an insurance policy, its effect is limited and controlled by section 2596 of the Code of 1906, and the rights of the parties are determined by the provisions of the above statute, which automatically writes itself into every insurance contract where the insurance company allows a mortgage clause to be inserted. . . . The effect of this statute is to make the contract between the insurance company and the mortgagee a new and independent contract, which is not in any way dependent upon or subservient to the conditions of the original policy between the owner and the insurance company. It may be that the original policy was void from its inception; but this fact cannot in any way invalidate the independent contract of insurance between the mortgagee and the insurance company, if the mortgagee have really

a valid and insurable interest in the subject of the insurance. Under section 2596 the mortgagee does not take by assignment from the original owner of the policy, taking only the rights which the original owner has and subject to all the conditions imposed upon the owner; but the very design and purpose of the statute is to place the insurable interest of the mortgagee on a safer basis than it would be if it were subject to be defeated by all the uncertainties accompanying the taking out of insurance by the owner in stating correctly his title, etc., and the many other conditions imposed by the insurance company, the nonobservance of which work a forfeiture of the policy in so far as the owner is concerned."

It is further contended by the appellant that the insurance policy became void as to Mrs. Golden by virtue of the trustee's sale, and that the mortgage clause therein became void when the Pan-American Life Insurance Company sold its note and deed of trust to the appellee. The policy provided, among other things:

"This entire policy shall be void if . . . foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed, or if any change other than by death of the insured take place in the interest, title or possession of the subject of insurance, whether by legal process or judgment or by voluntary act of the insured or otherwise."

It is further provided in the policy as follows: "This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or becomes void or ceases, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the cus-



tomary short rate; except when this policy is canceled by this company by giving notice, it shall retain only the *pro rata* premium."

The amount of this insurance policy was seven thousand dollars. This is less than the amount due under the mortgage to the Pan-American Life Insurance Company. Whether or not the policy became void as to the insured, Mrs. Golden, would make no difference as long as the mortgagee in the same was the Pan-American Life Insurance Company. Under the above section of our Code, it is expressly provided that none of the above-enumerated things would avoid the mortgage clause. The policy being perfectly valid as to the interest of the Pan-American Life Insurance Company, before the transfer took place, the attorney of the appellee discussed the matter with the agent of the insurance company and was told by him that the policy was all right and that he would keep it effective, provided the notes and collateral were purchased by the appellee. In pursuance of this agreement, he made the same statements that the policy was effective as to the interest of the appellee, and that he would make out the necessary mortgage clause. He had the authority to do this, and waived the actual writing of the mortgage clause. The insurance company is therefore estopped to make any of these contentions. *Bacot v. Insurance Co., supra*; *Insurance Co. v. Lumber Co.*, 72 Miss. 555, 17 So. 445; *Insurance Co. v. Dobbins*, 81 Miss. 623, 33 So. 504.

It is also contended by the appellant that, by the purchase of the notes and collateral by the appellee, there was an extinguishment of this debt secured by the first mortgage on the hotel property, and that, for this reason, appellee is not a mortgagee. The uncontradicted testimony in the record shows that it was not the intention of appellee to extinguish this debt or satisfy this first

mortgage. The testimony shows that there was uncertainty and doubt about whether or not the appellee acquired title to the property subject to the first mortgage; that it was the intention of the appellee to keep the first mortgage alive. If it be the intention of parties in purchasing a prior deed of trust on property, upon which they have some claim, to keep a prior mortgage or deed of trust alive, then this intention should govern.

"The passing of any consideration, even the due amount of money from the mortgagor to the mortgagee, may or may not discharge the mortgage, according to their intention, and it will not be held to operate as payment if the parties meant to keep the security alive and not to extinguish it." 27 Cyc. 1393.

"Where a mortgage incumbrancer becomes the owner of the legal title, or of the equity of redemption, a merger will not be held to take place if it be apparent that it was not the intention of the owner, or if, in the absence of any intention, the merger would be against his manifest interest.'" Jones on Mortgages (7 Ed.), volume 2, section 848.

"Where the purchaser of the equity of redemption takes an assignment of the mortgage, manifestly intending that there shall thereby be no merger of estates, a merger will not result unless the justice and equities of the case demand it. But where the purchaser simply pays the mortgage debt without having the mortgage assigned to him, or otherwise manifesting an intention to keep it alive, the mortgage will be extinguished." Id., section 856a.

It is also argued that the court committed error in the admission of certain testimony. The admission of this testimony, however, we do not consider reversible error, if error at all.

*The case is affirmed.*

## PERRY v. BANK OF COMMERCE.

[77 South. 812, Division A.]

1. BANKS AND BANKING. *Decreasing capital stock.*

Under Constitution 1890, section 88, the right is given to the legislature to create corporations and amend or change charters of corporations, and where the charter of the corporation itself provides that it may be amended by reading into it section 899, Code 1906 (Hemmingway's Code, section 4071), permitting amendments, and the corporation so provides by its by-laws, as authorized under section 901, Code 1906 (Hemmingway's Code, section 4073), and where the majority of the stockholders pass a resolution for the amendment, properly petition for the same under the law, and the amendment is granted as authorized by the statute. Such amendment is legal and valid.

2. BANKS AND BANKING. *Decreasing capital stock. Injustice to stockholder.*

An amendment to the charter of a bank reducing its capital stock from thirty-five thousand dollars to twenty-five thousand dollars does no injustice to a stockholder, where he is offered new stock under the amended charter which is of the same actual value, though a less number of shares, as the stock held by him in the bank before its capital stock was reduced by the amendment.

APPEAL from the chancery court of Grenada county.  
HON. J. G. MCGAUEN, Chancellor.

Suit by J. C. Perry against the Bank of Commerce.  
From a decree overruling a demurrer to complainants' bill, defendant appeals.

The facts are fully stated in the opinion of the court.

*Green & Green*, for appellant.

There is no authority under the Constitution and laws of Mississippi to compel a shareholder to accept a reduction in capital stock and to have his private property evidenced by shares, taken for the benefit of the corporation.

The question involved in the case is one of the most important, and involves the fundamental right of every shareholder in the state of Mississippi. Under the Constitution of the state, corporations shall be created by general laws, and all such laws shall be subject to alteration and repeal (Section 98), section 178 provides: "Corporations shall be formed under general laws only. The legislature shall have power to alter, amend, or repeal any charter of corporations now existing and revocable and any that may hereafter be created whenever in its opinion, it may be for the public interest to do so. Provided, however, that no injustice shall be done to the stockholders." See *State v. L. & N. R. R.*, 97 Miss. 50; *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed.—.

Primarily, under the corporate laws of the state of Mississippi, there is no power to increase or diminish the capital stock. When a corporation with a capital stock of thirty-five thousand dollars was created, there were created legal relations between (1) the state and the corporation; (2) between the corporation and its shareholders, and (3) between the shareholders *inter se*.

There were three several separate contracts that were entered into when this organization was perfected. First, the contract evidenced by the charter between the state and the corporation; second, the contract between the corporation and its stockholders; third, the contract between the shareholders. *Sommerville v. St. Louis*, 127 Pac.—; *Avondanle v. Shook*, 170 Ala. 383; *Cook on Corporations* (6 Ed.), 492; *Gary v. Mining Co.*, 32 Utah, 505; 75th, Ruling Case Law, 172; *Marion Trust Co. v. Bennett*, 169 Ind. 350; *Chicago, etc., R. Co. v. Allerton* (1873), 18 Wall. 233, 21 L. Ed. 902; *McNulta v. Corn Belt Bank*, (1897), 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203; *Note to Peck v. Elliott* (1897), 38 L. R. A. 616; *Clark, Priv. Corp.* (Tiffany's Ed.), p. 346; *Peck v. Elliott*, 36 L. R. A. 616; *Ross-Mehan Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed.

957; *Granger's Life & Health Ins. Co. v. Kamper*, 73 Ala. 325; *Einstein v. Rochester, Gas & E. Co.*, 146 N. Y. 46; *Chicago, etc., R. Co. v. Allerton*, 85 U. S. 18 Wall. 236, 21 L. Ed. 903; 2 *Thompson, Corp.*, secs. 2076, 2079; *Morawetz, Priv. Corp.*, sec. 434; *Beach, Priv. Corp.*, sec. 468.

To decrease the capital of such a company would be in most cases to withdraw capital pledged to the fortunes of the adventure. These reasons have led the courts with great unanimity to hold that the power of increasing the capital does not involve or imply the power to decrease. *Sutherland v. Olcott*, 95 N. Y. 94; *Moses v. Ocoll Bank*, 1 Lea, 388, 408; *Droitwich Patent Salt Co. v. Curson*, L. R. S. Exch. sec. 770; *Smith v. Goldsworthy*, 4 Q. B. 431; *Cook, Stock & Stockholders*, sec. 281; *Morawetz, Priv. Corp.*, sec. 434; *Sutherland v. Olcott*, 95 N. Y. 100; *Droitwich Patent Salt Co. v. Curson, & R., Exch.* 42; *In Re Financial Corp., L. R.* 2 Ch. App. Cas. 714; *Smith v. Goldsworthy*, 4 Q. M. 430; *Morawetz on Corp.*, sec. 230; *Morawetz on Priv. Corp.*, p. 408, section 434; *Atlanta Steel Co. v. Mynahan*, 75 S. E. 980; *Macon v. Richter*, 143 Ga. 400; *Morawetz on Private Corporations* (2 Ed.), section 4023; *Taylor on Private Corporations*, section 133; *Scoville v. Thayer*, 105 U. S. 148, 26 Am. & Eng. Ency. Law (2 Ed.), 849; *Taylor on Private Corporations* (4 Ed.), section 51; *Southern Securities Co. v. State*, 91 Miss. 195.

Our code gives a right to surrender a charter and wind up the corporate affairs, but it does not, at any point confer upon the majority shareholders, the absolute right to control the amount of capital stock and to alter the same at their whim or pleasure. *Harris v. Railroad Company*, 27 Miss. 531; *Hester v. Memphis, etc., R. R. Co.*, 32 Miss.—; *Ellison v. Railroad Company* 36 Miss. (1858), 1489; *Champion v. Railroad Company*, 35 Miss. 694; *Pratt v. Cotton Co.*, 51 Miss. 474; *Bank v. Pinson*, 58 Miss. 437; *State v. Bancroft*, 134 N. W. 335; Section 1, article 1; *Janesville v. Carpenter*, 77 Wis.

288, 46 N. W. 128, 8 L. R. A. 808; 20 Am. St. Rep. 123; *State ex rel. Kellogg v. Currens, et al.*, 111 Wis. 431, 435, 87 N. W. 561, 56 L. R. A. 252; *Adirondack v. New York*, 176 U. S. 335, 200 Sup. Ct. 460; 44 L. Ed. 492; *People ex rel. Schurz v. Cook*, 148 U. S. 387, 13 Sup. Ct. 645, 37 L. Ed. 498; *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 16 Sup. Ct. 705; 40 L. Ed. 833; *Bank v. Tennessee*, 163 U. S. 416, 16 Sup. Ct. 1113, 41 L. Ed. 211; *Shields v. Ohio*, 95 Tenn. 319, 24 L. Ed. 357; *Greenwood v. Freight Co.*, 104 U. S. 13, 26 L. Ed. 961; *Wilmington Ry. Co. v. Wilmington, etc.*, 8 Del. Ch. 468, 46 Atl. 12; *Avondale v. Shook*, 170 Ala. 383.

Since the decision of the case of *Trustees of Dartmouth College v. Woodward*, 4 Wheat 518, 4 L. Ed. 629, it has been fully recognized in this country that the charter of a private corporation is a contract within the meaning of and under the protection of that clause in the Constitution of the United States which provides that: "No state shall pass any law impairing the obligations of contracts" (section 10, article 1, Constitution U. S.), but the charter of a corporation having a capital stock is a contract between three parties and forms the basis of three distinct contracts. The charter is a contract between the state and the corporation; and, it is a contract between the corporation and the stockholders; third, it is a contract between the stockholders and the state. Cook on Corporations (6 Ed.), 492. The charter is under the protection of said clause of the federal Constitution in all three of its aspects as a contract. *Gary v. Mining Co.*, 32 Utah 505; 2 Cook on Corp. (5 Ed.), sec. 492; 1 Clark & Mar., Priv. Corp., sec. 271-f; 3 Clark & Mar., Priv. Corp., sec. 631-f; *Dartmouth College v. Woodward*, 4 Wheat (U. S.), 518, 4 L. Ed. 629; 1 Rose's Notes on United States Reports, p. 942; *In Re Newark Library Ass'n*, 64 N. J. Law, 217, 43 Atl. 435; *Pronick v. Spirits Distributing Co.*, 58 N. J. Eq.

97, 42 Atl. 586; *Intiso v. Loan Association*, 68 N. J. Law, 588, 53 Atl. 206; *Zabriskie v. Hackensack & N. Y. R. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617; *Snook v. Georgia Improvement Co.*, 83 Ga. 61, 9 S. E. 1104; *Grangers Life & Health Co. v. Kamper*, 73 Ala. 341.

That corporations have not an implied power to effect such changes, that it can be effected only by legislative sanction, seems to be settled. Green's Brice's *Ultra Vires*, 112; Thompson on Liability of Stockholders, sec. 115; *Lathrop v. Kneeland*, 46 Barb. 432; *Mutual Life etc., Ins. Co. v. McElway*, 112 N. J. Eq. (1 Beasley) 133; *New York & N. J. R. R. Co. v. Schuler*, 34 N. Y. 30; *Railway Company v. Allerton*, 18 Wall. 233; *Scoville v. Thayer*, 105 U. S. 143; *Bryan v. Aiken*, 82 Atl. 817; *Bitler v. Cooper Co.*, 93 Atl. 381.

These decisions demonstrate the points for which we contend: (1) There is a contract between the shareholders whose fundamental terms are fixed by the charter; (2) That these terms so thus fixed are a contract; (3) That the amount of the capital stock is a term of the contract, and any change therein is fundamental; (4) That such fundamental change can be made by the majority only when it is assented to by all parties.

It appearing affirmatively in the instance case, that not only was there no assent given by all parties, but on the contrary, a very active and persistent dissent, we submit, with the utmost confidence, that it does not lay within the power of this majority to thus take from us our property, to compel us to make a contract which we did not want to make, and to come into an organization in which we did not desire to enter. The right of appellant so to do is sustained by the unanimous authorities; and we therefore respectfully submit that the cause should be reversed and the bill dismissed.

*McLean & Carothers*, for appellee.

Counsel state that in effecting the amendment in this case no action was taken by the state to this end, and argue that the right to amend is "limited and circumscribed, and can be exercised (1) only by the legislature; (2) when the public interest demands it, and not for the benefit of private gain; and (3) upon the express conditions that no injustice shall be done the shareholders."

"Counsel utterly ignore section 899, Code 1906, and fail to correctly set forth the record. In the case at bar application was duly made to the state for authority to make the amendment, all requirements of law were strictly complied with, and the reduction was authorized by the state. If it be true, as contended by appellant, that only the legislature has the authority in itself to alter, change, or amend charters, then every time a corporation sought to amend its charter a special session of the legislature would have to be called for the purpose, or else these amendments could be made only once in every two years at the regular sessions of the legislature, and the wheels of business progress would thereby be blocked. And then, too, the constitution provides that corporations are to be created under general laws, certainly they may be amended under general laws. If counsel's position be sound, then we should have the strange situation of the legislature dealing with corporations by special laws, the very thing the Constitution has prohibited. It is true that section 178 of the Constitution provides that the legislature may alter, amend, and change charters, and it was in accordance with said section 178 and section 888 of the Constitution of the state that chapter 24 of the Code of 1906, was adopted; and by section 899 of said Code, power was given and delegated to the governor by the legislature to grant, with the advice of the attorney-general, amendments to char-



ters of corporations—except in the cases of railroads other than street railroads and insurance companies.”

In *Yazoo City v. Lightcap*, 82 Miss. 74, in discussing the question of charters and amendments thereto, the court said: “There was a uniformity intended to be secured, but that was uniformity only as to the general mode of granting and amending charters. It was thought far more convenient, as ridding the legislature of useless special applications, for such charters and their amendments, and as securing for the public service for more important legislation, the time that had theretofore been uselessly consumed in the consideration of such special legislation, to direct that thereafter—that is to say, after the adoption of said section—the legislature should provide a general law, prescribing a uniform mode, in conformity with which municipal charters should be granted and amended. That the legislature has done.” And again, on page 177: “It was provided in the Code of 1857 (ch. 35, art. 1, secs. 1-3), how corporations might be created, etc. This has been the law practically ever since, and the only change, a very great and useful change it is true, accomplished by section 88 of the Constitution is in providing that the legislature should be freed from the nuisance of having to deal separately with each and every charter and its amendments; referring the granting and amending of such charters, as to the mode of granting them and the mode of amending them, to the operation of the general law.”

Under the new state banking law the manner of renewal and amendment of charters remains the same, for section 32 of said law (chap. 124, Laws of 1914), provides: “Any bank desiring to renew or amend its charter may do so in the manner provided by law for the amendment of charters,” etc.

To comment on all the authorities cited by appellant would unduly prolong this brief, and if the court will examine these authorities, we submit that it will be

seen that they are not in conflict with the position we take. The rule invoked by counsel for appellant is the ancient law as announced in the *Dartmouth College case*, and a great many of the cases cited by them embody excerpts from the opinion in that case. Appellant loses sight entirely of the power reserved by the state to alter, amend, and change charters of corporations, and "the historical origin of this reservation of the right to amend was due to the effort of the various states to escape from the decision in the *Dartmouth College case*." 2 Cook on Corps., sec. 501, citing *Springs Valley Waterworks v. Schottler*, 110 U. S. 347-352.

Counsel for appellant at pages 5-6-7-8-9-10-11 of their brief cite cases in which it is said that corporations have no implied power to change their capital stock, but there is not a single case cited which says that a corporation has no right to make a change in its capital, where the state reserves the right to alter and amend charters, and especially so where the charter itself provides that the charter may be amended.

Appellant quotes at length from 7 Ruling Case Law, sec. 172, we fail to see where appellant derives any comfort for his position from this citation, which is as follows: "But the rule against an implied power of a corporation to increase the amount of its capital when that is definitely fixed by the charter or stationary articles of incorporation, has no application where the power to determine upon the capital to be engaged is made one of the modes for internal regulation by by-laws."

Furthermore, section 174 of 7 Ruling Case Laws is as follows: "The right to increase the capital stock of a corporation is intended for the benefit of the joint owners, and can be exercised only by the corporation itself. An increase or reduction of the capital stock of a corporation is a fundamental change in its affairs, and must be authorized by a majority of the stockholders at a corporate meeting, and in the manner pre-

scribed by law. Where the charter provides that the capital stock may be increased at the pleasure of the company, it is a privilege not included in the powers and duties of the directors of the corporation, and may not be exercised by the directors alone as the ordinary business transactions of the company unless expressly authorized thereto but must be authorized by the shareholders at a corporate meeting. Citing *McNulta v. Corn Belt Bank*, 56 A. S. R. 203.

Appellant next quotes from *Marion Trust Co. v. Bennett*, 169 Ind. 350, as follows: "A change in the amount of the capital stock of a corporation, like a change in the objects thereof, is fundamental, and cannot be made without clear legislative authority." In support of this doctrine is cited *Chicago, etc., R. Co. v. Allerton*, 18 Wall. 233, and *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203.

Now, let's see what this language really means and what the cases cited in support of the doctrine really hold. The case of *Chicago, etc., R. Co. v. Allerton*, was where the board of directors of a corporation attempted to increase the capital stock without authority so to do, and the court merely held that the change in the capital stock was of such a nature that the directors alone, and without the matter being submitted to and approved by the stockholders, have no power to increase it unless expressly authorized thereto. The court said at page 236: "If the charter provides that the capital stock may be increased, or that a new business may be adopted by the corporation, this is undoubtedly an authority for the corporation (that is the stockholders) to make such a change by a stockholders' vote, in the regular way."

The case of *McNulta v. Corn Belt Bank*, *supra*, was another case where it was said that an increase of capital stock was a change of such a nature that it could not be made by the board of directors alone, but must be authorized by a majority of the stockholders, at a

corporate meeting, and this case holds at page 209: "The policy of a corporation is always under the control of a majority of its stockholders, and the lawful exercise of its franchise and business must be regulated and governed by a majority of its stockholders." Citing *Wheeler v. Pullman Iron etc., Co.*, 143 Ill. 197.

The case of *Peck v. Elliott*, 36 L. R. A. 616, next cited by appellant, is really an authority for appellee when rightly considered and understood. The part of the opinion which appellant quotes is that a corporation has no power to increase or diminish its capital stock unless expressly authorized so to do. In the instant case the power was reserved both by the state and the charter of the corporation.

It is a well-settled rule of law that changes or alterations of charters of corporations, which are auxiliary or incidental, may become ingrafted upon the charter by the acceptance of a majority. This doctrine, which is a universal one, is set forth very clearly in the well-considered case of *Perkins v. Coffin*, Ann. Cases, 1912C, page 1193, 84 Conn. 275; *New Haven, etc., R. Co. v. Chapman*, 38 Conn. 56, 71; *Joy v. Jackson, etc., Plank Road Co.*, 11 Mich. 155, 171; Clark and Marshall on Corporations, p. 171, sec. 57e; *Mower v. Staples*, 32 Minn. 284, 286, 20 N. W. 225; *Wright v. Minn. Mut. L. Ins. Co.*, 193 U. S. 657, 664, 24 Sup. Ct. 549, 48 U. S. (Law Ed.) 832; 3 Clark & Marshall on Corps., page 1904.

"It is generally agreed that amendments to a charter which are not radical or fundamental, but are merely auxiliary to the purpose of the corporation, may be accepted by a majority of the stockholders with the effect of binding all the stockholders, whether assenting or not." A. & E. Enc. Law (2 Ed.), page 680, and authorities cited in note 4; *Zabriskie v. Hackensack, etc., R. Co.*, 18 N. J. (Eq.) 183, 90 Am. Dec. 617; *Wright*

v. *Minn. Mut. Life Ins. Co.*, 193 U. S. 657; 2 Cook on Corps., sec. 499.

"Whether an amendment materially changes the corporate plans or not is a question of law for the court. Accordingly each case is to be decided according to the peculiar circumstances of that case, and no general rules can be laid down which will apply to all cases. Many illustrations are given in the notes below" (Note 6). "Reduction of capital stock and shortening of the road." *Troy, etc., R. Co. v. Kerr*, 17 Barb. 581; *Jesslyn v. Pacific Mail S. S. Co.*, 12 Abb. Pr. (N. S.) 329. Enlarging the capital stock and extending the road, such changes not appearing on the record to be detrimental. *Peoria, etc., R. Co. v. Elting*, 17 Ill. 429; *Rice v. Rock Island, etc., R. R. Co.*, 21 Ill. 93, an amendment increasing the capital stock and authorizing a branch road does not release subscribers. *Schenectady, etc., R. Co. v. Thatcher*, 11 N. Y. 102. All of these amendments were held to be of such a nature as not to radically change the charter of the corporation.

We submit that in the instant case the reduction of the capital stock was in no sense a fundamental or radical change, but it was an alteration made in furtherance of the purpose for which the corporation was organized. 7 Thompson, Corp., sec. 8694; *Theis v. Dun*, 110 Am. St. Rep. 880, 125 Wis. 651, 104 N. W. 985.

The case at bar presents not an instance of where the majority stockholders are trying to gain any unfair advantage. The only advantage being such as accrues to the corporation and each and every individual stockholder thereof. But rather it is a striking illustration of where one, lone, recalcitrant stockholder seeks to make the majority bow to his will, and would rather see the success of an institution, the interests of which he should have at heart,—jeopardized, than to fail to have his own way, and to carry his point.

The laws of this state with reference to corporations, and amendments of the charters thereof, which were in effect when charter in the instant case was granted, and which are still in force and effect in this state, became as much a part of the charter and as much a part of the contract entered into between the corporation and the state, and the corporation and its shareholders, as if expressly and actually written into the charter. "It is a principle of law that a corporation created under the general laws takes its authority from such general laws, and not from the articles of association (*People v. Chicago Gas Trust Co.*, 130 Ill. 268) and a corporation created under chapter 25, Annotated Code of 1892, can only exercise the powers prescribed by that chapter. *Woodberry v. McClurg*, 78 Miss. 836; *Nugent v. Board of Supervisors*, 19 Wallace, 250, 251.

We have shown above that a majority of the stockholders can bind the minority on all alterations of an auxiliary nature, and those which do not change the object and purpose for which the corporation was organized, and that the amendment of the charter in the instant case was an auxiliary one; but we have gone further than that, and have shown from the language of the supreme court of the United States that even granting for the sake of argument that the alteration is fundamental, yet if such alteration is contemplated by either the charter or the general laws of the state, the dissenting, minority stockholders is bound, if such alteration be made. 2 Thompson in his work on Corps., sec. 2088; *Port Edwards, etc, R. Co. v. Arpin*, 80 Wis. 214; *C. H. Venner Co. v. U. S. Steel Corp. et al.*, 116 Fed. 1013; *McKee v. Chautauqua Assembly et al.*, (Circuit Court of Appeals, Second Circuit, decided April 20, 1914) 130 Fed. 539.

The law is plain that "the by-laws of a corporation when duly enacted are written into the charter and are a part of the fundamental laws of the corporation, bind-

ing not only on the corporators and the corporation, but on those dealing with it." *Commonwealth v. Vandegrift*, Ann. Cases, 1912 C. 1269, 232 Pa. St. 53, 81 Atl. 153. The by-law, with reference to amendments in the case at bar, was adopted at the time the charter was accepted; and provides that the charter may be amended in any particular by a majority of the stockholders. 2 Morawetz on Corps. (2 Ed.), sec. 1111; *McNulta v. Corn Belt Bank*, 56 Am. St. Rep. 209; *Hinds County v. Natchez, J. & C. R. Co.*, 38 So. 191, and 192, 85 Miss.—

Under our state banking law a banking corporation may go into liquidation on a vote of two-thirds of its stockholders, and certainly, if two-thirds of the stockholders can absolutely liquidate the corporation and cause it to go out of business, it should be in the power of a majority of the stockholders to make a change in the capital stock of the corporation for the purpose of continuing the business to the best advantage.

The state has control of banks under the police power lodged in the state, as was held in *Bank of Oxford v. Love*, 72 So.—, and it has the undoubted right to regulate banks. This is also the rule of the United States supreme court, as is held in the cases from that court cited in the opinion in the case of *Bank of Oxford v. Love*, *supra*. The bank of Oxford case holds unqualifiedly that the state banking law of 1914, is constitutional.

Now, granting for the sake of the argument that appellant's position is sound, and that the amount of the capital stock as fixed by the charter cannot be changed, then he has no case, according to his own argument. The capital stock of the appellee was originally twenty-five thousand dollars—this was the amount named in the charter. Thereafter, it was increased to thirty-five thousand dollars but according to appellant's argument that increase was illegal, as the very same steps were taken to increase the amount of the capital stock as were taken in the reduction of the same, and if the decrease is invalid, it necessarily follows that the

increase was likewise invalid; therefore, the capital today is what it has always been (if appellant's argument holds water at all) to-wit, twenty-five thousand dollars, the amount named in the charter.

We confidently submit that the cause should be affirmed.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from a decree of the chancery court overruling the demurrer to the complainant's bill, and presents for our consideration one proposition of law which is, to state it in the simplest language: Can an organized state bank with an authorized capital stock of thirty-five thousand dollars reduce its capital stock by charter amendment to twenty-five thousand dollars, by a majority vote of the stockholders, it having adopted a by-law by the stockholders at the time its charter was accepted providing expressly that any and all amendments to the charter might be made whenever a majority of the stockholders may so declare to have the charter amended in any particular? The contention of appellant is that no such amendment to a charter reducing the amount of the capital stock can be validly made except by unanimous vote of all the stockholders of the corporation; and that the right to amend is limited and circumscribed, and can be exercised only by the legislature, when the public interest demands it and not for the benefit of private gain, and upon the express condition that no injustice shall be done the shareholders.

The charter of the appellee bank and amendment thereto provided that the capital stock of the bank should be thirty-five thousand dollars. At the time the charter was accepted and the bank organized, the following by-law was duly and regularly adopted by the stockholders under authority of section 901, Code 1906 (section 4073, Hemingway's Code):



"An increase in the capital stock of the bank may be made whenever a majority of the stockholders may so declare, and any and all amendments to the charter may be made whenever a majority of the stockholders may so declare, and thereupon permission to the state may be applied for, to increase the capital stock, or to have the charter amended in any particular."

Section 899, Code 1906 (section 4071, Hemingway's Code), in force now and at the time the charter was granted, provides as follows:

"Renewals and Amendments.—Every corporation created under the provisions of this chapter, and every corporation heretofore created, whether by special act of the legislature or under the general law, 'except railroads other than street railroads and insurance companies,' desiring a renewal or amendment of its charter, shall make publication as above, if the original charter were required to be published, setting forth at length in such publication, the nature and extent of the amendment or amendments desired, and the Governor, with the advice of the attorney-general, may grant the same. But in case of renewal merely it shall be sufficient for the Governor to give a certificate that the original charter is renewed, under the great seal of the state."

See, also, Acts 1914, page 123, section 32.

Section 88 of our Constitution reads: "The legislature shall pass general laws, under which local and private interests shall be provided for and protected, and under which cities and towns may be chartered, and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered; and all such laws shall be subject to repeal or amendment."

After the resolution was passed and adopted by a majority of the stockholders of the bank, which resolution is here quoted:

"Resolved by the stockholders of the Bank of Commerce, of Grenada, Miss., that the present capital

stock be reduced from thirty-five thousand dollars to twenty-five thousand dollars; that application be made to the state of Mississippi, so as to authorize this decrease in capital after compliance with the laws of said state; and, further, that when said capital is reduced that the certificates of stock now outstanding be called in and new certificates be issued in lieu of said old certificates in proportion to the amount of stock now held by each stockholder—the new certificates to be issued upon the said reduced capital—which said resolution after being discussed was unanimously adopted by all of the stockholders”—the amendment to the charter authorizing the reduction of the capital stock to twenty-five thousand dollars was duly published as required by section 899, Code 1906 (section 4071, Hemingway's Code), and was granted by the Governor with the advice of the attorney-general—all of which was regular and in accordance with the statute.

We are unable to see any merit in the contention of the appellant that the amendment to the charter of appellee was not in all respects legal and valid. The question is presented as to whether this change in the amount of the capital stock from thirty-five thousand dollars to twenty-five thousand dollars is a radical or fundamental change in the purpose and character of the original charter necessitating a unanimous vote of the stockholders to make such change, or whether such change in the capital stock was merely auxiliary or incidental to the original purpose or plans of the corporation and might be made by a majority of the stockholders. But we consider it unnecessary to pass upon this question, although we think the better rule is that such a reasonable change in the amount of the capital stock is not a fundamental or radical change, but is auxiliary and incidental to the main purpose of the corporation. However, under either view it appears certain to us that under the Constitution and statutes of our state the amendment to the charter here in question was contemplated

and permissible, and was authorized by a resolution passed by a majority of the stockholders of the bank under the statute (section 899, Code 1906; section 4071, Hemingway's Code), which permits such amendments, and more especially was it proper since, under section 901, Code 1906, a by-law was duly passed and in force authorizing any and all amendments to the charter by a majority of stockholders at the time the appellant, who seems to be the only objecting stockholder, became or was a stockholder in the bank (*Commonwealth v. Vandegrift*, 232 Pa. 53, 81 Atl. 153, 36 L. R. A. [N. S.] 45 Ann. Cas. 1912C, 1269).

In other words, under Constitution, section 88, the right is given to the legislature to create corporations and amend or change charters of corporations, and where the charter of the corporation itself provides that it may be amended, as it does here by reading into it section 899, Code 1906, and the corporation so provides by its by-laws, and where the majority of the stockholders pass a resolution for the amendment, properly petition for the same under the law, and the amendment is granted as authorized by the statute, such amendment is legal and valid. 7 R. C. L. section 174.

"An amendment may be said to be auxiliary and incidental when it merely grants new powers or authorizes new methods and new plans for the purpose of carrying out the original plan and effecting the real object of that plan." 2 Cook on Corporations (6 Ed.), section 499.

"Amendments, which do not change the nature, purpose, or character of a corporation or its enterprise, but which are designed to enable the corporation to conduct its authorized business with greater facility, more beneficially, or more wisely, are auxiliary to the original object." *Mower v. Staples*, 32 Minn. 284, 20 N. W. 225.

"Where there is an exercise of the power in good faith, which does not change the essential character of the business, but authorizes its extension upon a modi-

fied plan, both reason and authority support the corporation in the exercise of the right." *Wright v. Minn. Mut. L. Ins. Co.*, 193 U. S. 657, 664, 24 Sup. Ct. 549, 551 (48 L. Ed. 832).

Under the authority of our Constitution, section 88, the legislature has provided a simple way of obtaining a corporate charter and amendments thereto; and when it appears necessary or beneficial to the interests of the corporation that its capital stock be increased or decreased, the method provided by the legislature for so doing is plain and constitutional; and when the requirements of the statute have been met by a majority of the stockholders of the corporation and the amendment has been granted by the officials named by the legislature for that purpose, the amendment is valid. This method of obtaining charters and amendments to them was wisely substituted by the legislature for the old, tedious, and expensive method of securing corporate charters directly from the legislature, and we see no constitutional objection to it.

If the contention of appellant were held to be sound, we would have the absurd situation in this case of one stockholder preventing the corporation from changing the amount of its capital stock, by either decreasing it or increasing it, which change might be absolutely necessary to the best interests of the bank or even necessary to its very existence, since, under our banking law of 1914, it may be that the affairs of the bank were in such a condition that the state bank examiner should demand that the capital stock be decreased and the ten thousand dollars be written off the books of the bank so as to put the institution on a sound banking basis as required by the banking laws of our state. Then to say, as contended by appellant, in view of our statutes with reference to charters of corporations and the amendments thereto, and the banking laws of our state, that one single minority stockholder can prevent

the change in the capital stock when all of the other stockholders desire the change, and it was necessary to the existence of the institution that the change be made, would be to give the dangerous power to one stockholder to force the bank into liquidation, resulting in loss to the other stockholders, contrary to the policy of our banking law, and against the best interests of all concerned. But minority stockholders have no power under the laws of this state to prevent a reasonable change in the amount of the capital stock, as in this case, regardless of whether such change be radical or fundamental or whether it be merely auxiliary and incidental to the original purposes of the corporation.

“When a corporation is authorized by its charter to increase its capital stock, the power to increase becomes, so to speak, a part of the contract of subscription, and its exercise will be binding upon the stockholder, whether or not he assents thereto. The common-law rule that any material alteration in the charter of the corporation, without the consent of a stockholder, relieves him from liability on his stock subscription, does not apply to such a case.” Thompson on Corporations, vol. 2, section 2088; *Port Edwards R. Co. v. Arpin*, 80 Wis. 214, 49 N. W. 828.

As we have said above, the appellee corporation here was authorized by its charter, and the statutes written into it, to make amendments to its charter, and thus increase or decrease its capital stock. When we say that the charter of the appellee bank authorized its amendment, we mean that the charter, with our statutes (section 899 and 901, Code 1906), together with the by-law passed at the time the charter was accepted, referred to above, authorized such amendments of the charter, and when the appellant subscribed for the stock, he then and there became bound under the charter and its amendments to be governed by the will of a majority of the stockholders of the corporation whether he agrees

or objects to the amendment increasing or decreasing the amount of the capital stock.

In answer to the last contention of the appellant, which question does not really arise here, that no amendment of the charter can be made if it shall do an injustice to the shareholders, we say in this case that it certainly appears that no injustice has been done to the appellant by amending the charter of the appellee bank reducing the amount of the capital stock from thirty-five thousand dollars to twenty-five thousand dollars, as the appellant is offered new stock under the amended charter which is of the same actual value, though a less number of shares, as the stock held by him in the bank before its capital stock was reduced by the amendment.

Appellant cites and relies upon the case of *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968, as an authority to sustain his position, but the case is not in point for the reason that in the case cited by counsel the facts are different and the law of the state of Kansas was quite unlike the law of Mississippi. Under the laws of Kansas a corporation was prohibited from increasing its capital stock to an amount exceeding double its original capital stock authorized in its charter. In that case the corporation attempted to increase its capital stock from one hundred thousand dollars to four hundred thousand dollars, which was violative of the law of that state and was void, but it was held in that case that an increase from one hundred thousand dollars to two hundred thousand dollars was valid. The difference in the Kansas case and the case before us is very obvious.

The judgment of the lower court is affirmed, and case remanded, with leave to answer within sixty days after the mandate reaches the lower court.

*Affirmed.*

## McCABE v. GUIDO.

[77 South. 801, Division B.]

1. **BANKRUPTCY. *Transfer in violation of state law. Right of trustee.***  
Under Code 1906, section 2522, so providing a transfer or conveyance of goods and chattels or lands between husband and wife is not valid as against any third person unless in writing, and acknowledged and filed for record, and a married woman's trustee in bankruptcy may recover for the benefit of her creditors a stock of goods transferred verbally by her to her husband.
2. **HUSBAND AND WIFE. *Transfer between. Validity as against third persons.***  
Under section 2522, Code 1906, rendering invalid any verbal transfer of property between husband and wife as to third persons, the creditors of the wife have a right to attack her verbal transfer of property to her husband, whether her creditors be antecedent or subsequent to such transfer.
3. **BANKRUPTCY. *Transfers in violation of state laws. Rights of trustees in bankruptcy.***  
Where a wife made a verbal sale of a stock of goods and fixtures to her husband in violation of section 2522, Code 1906, this did not forbid the husband from making new purchases, nor from contracting in his own name, nor from conducting and operating the store in his own name. The store fixtures and property on hand constituting the subject of the alleged sale, may in such case be recovered by the wife's creditors or her trustee in bankruptcy.
4. **BANKRUPTCY. *Transfers. Rights of trustee.***  
The trustee of a married woman in bankruptcy, was not entitled to recover from her husband the amount expended by her for the support and maintenance of herself and children during her husband's abandonment of his family, where the trustee was presumably suing only for creditors who had sold and delivered to the wife goods for mercantile purposes and not for creditors who supplied the wife with the necessities of life on the credit of her husband.
5. **BANKRUPTCY. *Suits by trustee. Nature and form of remedy.***  
Under section 533, Code 1906, giving the chancery courts jurisdiction of suits by creditors to set aside fraudulent conveyances, where a wife owning a store as her separate property verbally

exchanged it for a store owned by her husband, and the husband purchased a new stock of goods for the store taken by him, which had been commingled with that on hand in the store of the wife at the time the invalid transfer was made. In such case the wife's trustee in bankruptcy could sue in chancery to recover the property transferred, and still remaining in the hands of the husband, since only a court of chancery could adequately protect the rights of both husbands and wife and the creditors of each.

6. **CONFUSION OF GOODS.** *Application of doctrine.*

In such case the doctrine of wrongful commingling of goods did not apply.

7. **BANKRUPTCY.** *Transfers. Rights of trustees.*

Where a married woman verbally exchanged a store and stock of goods owned by her, as her separate property, for a store owned by her husband, and paid an indebtedness on account of the store taken by her from her husband, the trustee in bankruptcy of the wife could not hold the husband liable for such payment by the wife, since the exchange was good as between the husband and wife, and the only right of the creditors was to levy upon or take charge of the property in existence at the time of and constituting the subject-matter of the invalid transfer.

APPEAL from the chancery court of Warren county.

HON. E. N. THOMAS, Chancellor.

Suit by H. C. McCabe, Trustee in Bankruptcy, against Frank Guido. From a decree sustaining a general demurrer to the bill of complaint, plaintiff appeals.

The facts are fully stated in the opinion of the court.

*J. C. Bryson*, for appellant.

Four grounds of liability are set up in the bill of complaint; first, right to recover possession of the Washington street store and stock of merchandise as the property of the bankrupt; second, liability of appellee for money used by the bankrupt in the payment and discharge of appellee's debts against the Hall's Ferry Road store; third, liability of appellee for the money used by the bankrupt in the support and maintenance of appellee's family after he had abandoned the same;



fourth, right to recover any surplus of the fifteen hundred dollars borrowed over and above what was paid out in the purchase of goods for the Washington street store.

The demurrer necessarily admits the truth of all the averments of the bill in support of the several grounds of liability and being general and not special, must apply to all of them considered together and not separately as to any particular grounds of liability.

If any ground of liability appears to be well taken, then the court below erred in sustaining the demurrer, even though one or more grounds of liability set up may not be good. I shall discuss the several grounds of liability in the order set out above. As to the right to recover the Washington street store. The bill alleges that this store was originally the property of Louise Guido, the bankrupt; that money raised from her real estate purchased the stock of goods and that while it was turned over to her son, Frank Guido, Jr., to operate, the actual title to the property was in the bankrupt.

The bill further alleges that there was an attempted transfer of this store from the bankrupt to her husband, but that the assignment was verbal and not in writing and not made of record and for that reason was void as to complainant and the creditors represented by him.

Do these averments bring the case within the purview of section 2522 of the Mississippi Code of 1906? This statute provides: "A transfer or conveyance of goods and chattels, between husband and wife, shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged and filed for record as a mortgage or deed of trust is required to be; and possession of the property shall not be equivalent to filing the writing for record, but to affect third persons, the writing must be filed for record. We submit that the averments of the bill clearly bring the case within the condemnation of the statute.

This court has construed the statute set out above in a number of cases but I shall refer to only a few of them. *Gregory v. Dodds*, 60 Miss. 549; *Kennington v. Hemingway*, 101 Miss. 259; *Austin v. Posey*, 64 So. 5. In considering section 2521, a companion Code provision, this court recently said in the case of *Banks v. Pullen*, 74 So. 424: "The statute was designed to protect the public. Secret contracts between husband and wife are condemned for obvious reasons. We see in this case a husband building a house on the land of his wife and entering into a contract whereby he was to receive the means of the wife for the purpose of securing the material with which to erect the house. The husband did not use the means to buy the material; he bought it from appellant on credit. Who must suffer? The husband is made the statutory agent of his wife whenever he uses any of her means to carry on a business in his own name."

It follows necessarily that if the assignment of the Washington street store by the bankrupt to her husband (appellee) was void that the store remained the property of the bankrupt and was her property at the time the petition in bankruptcy was filed, and, as such, the trustee in bankruptcy is entitled to it and to sell and convert the stock of merchandise into cash and apply the same to the payment of the debts proven against the bankrupt. Such is the letter of the statute and its necessary legal effect and in addition it is the even-handed justice of the situation.

Hall's Ferry Road store. It is next alleged that the Hall's Ferry Road store was largely indebted at the time the bankrupt took charge of it, for merchandise purchased before then for it by the appellee, and that the bankrupt paid these debts, and it is sought to hold appellee liable for the debts so paid, on the theory that the payments inured to his benefit.

In *Caldwell v. Hart*, 57 Miss. 123, this ground of liability was upheld, the court saying: "The appellees

contracted with the husband as principal, extending to him personally the credit, upon the belief that he was the owner of the plantation. The sole equity of the bill to charge the wife's separate estate is that the appellees allege that they subsequently discovered that the husband purchased for the benefit of the wife's estate."

The case at bar is identical except it is now sought to hold the husband as debtor to his wife to the extent of the debts paid by her for him.

Liability for maintenance of family. There may be no direct authority under the decisions of this state to charge a husband with the wife's debts incurred by her in support and maintenance of the family, but it strongly appeals to conscience and sound morals.

In the case at bar the husband and wife were both in business, operating independent stores, the husband abandoned his wife and children, leaving the wife to maintain herself and their children from her business, thereby relieving himself and his business from the burden of family support and maintenance and casting it on the wife and her business. The husband by this relief prospered and the wife by this burden failed and thereby cast on her creditors the maintenance of the family. It would seem that the husband in good conscience ought to be held liable to recompense the wife's creditors to the extent they have contributed to the support of the husband's family.

Liability for surplus of fifteen hundred dollars. This ground of liability is controlled by section 2520, quoted above and by *Caldwell v. Hart*, 57 Miss. 123, cited above. "If the husband receives and appropriates to his own use the property of the wife, he shall be debtor to his wife therefor."

If all the fifteen hundred dollars was not paid out in purchasing goods for the Washington street store that which was left in the hands of the husband was the property of his wife and under the above Code provi-

sion he is debtor to his wife to that extent and necessarily to the appellant who stands here in her place.

Independent of the statute he is liable to her for the surplus of this fund remaining in his hands as her money and received by him.

As to the jurisdiction of this court. Three grounds are laid: first, under Code, section 553, as a creditors' bill seeking to set aside and annul the verbal assignment of the Washington street store as a fraud in law on creditors; second, as a bill for accounting; third, as a bill seeking to subrogate to the demands of creditors the liability of the husband to the wife for support and maintenance of the family which he cast upon her and through her upon her creditors who are now represented by appellant as her trustee in bankruptcy; fourth, as a bill to enforce the equitable liability of the husband for the property of the wife which came into his possession as provided for in Code, section 2520.

We submit that each of the foregoing grounds are sufficient but if any one of them be held good the general demurrer should have been overruled.

*Henry & Canizaro*, for the appellee.

Counsel for the appellant attempts to sustain this claim of liability against the appellee on the following grounds which we here quote in full, to-wit: First, "Right to recover possession of the Washington street store and stock of merchandise as the property of the bankrupt; second, Liability of appellee for money used by the bankrupt in the payment and discharge of appellee's debts" against the Hall's Ferry Road store; third, "Liability of appellee for the money used "by the bankrupt in the support and maintenance of appellee's "family" after he had abandoned the same; fourth, "Right to recover any surplus of the fifteen hundred dollars borrowed over and above what was paid out in the purchase of goods for the Washington street store."

"We will first answer appellant's counsel's suggestion that: The demurrer admits the averments in the original bill that the Washington street store belonged to the bankrupt," etc., and he says: "That the fact that the appellee filed an answer denying fraud does not help the situation. The answer having served its purpose, the consideration of it must be at an end." Our contention is that while the demurrer admits the allegations that are well pleaded, it does not admit conclusions of law by the pleader. 16 Cyc., page 277, announces the following rule: (B) What is not admitted. By virtue of the restriction of the rule just stated to well-pleaded facts, a demurrer does not admit an assertion in the nature of argument or inference based on facts pleaded, or that the construction of an instrument set out is that alleged by the pleader, or in general any allegation in the nature of legal conclusions." *Perkins v. Guy*, 55 Miss. 153, a demurrer admits all matters of fact well pleaded for, does not admit conclusions of law stated by the pleader. *Partee v. Kortrecht*, 54 Miss. 66; *Watts v. Patton*, 66 Miss. 54, 5 So. 628; *Weir v. Jones*, 84 Miss. 606; *M. & C. R. R. Co. v. Neighbors*, 51 Miss. 412; *Watts v. Patton*, 66 Miss. 54, 5 So. 628; *McInnis v. Wicassett Mills*, 78 Miss. 52, 28 So. 725.

Liability for maintenance of family. The next contention of the appellant is clearly a fishing proposition as it is that Mr. Guido, Sr., is liable for fifty dollars a month from May, 1915, to February, 1917, amounting to sixteen hundred dollars; an amount which the appellant claims that Mrs. Guido expended in and about the support and maintenance of the family. It will be noted that this claim together with all the other claims of the appellant is based solely on the appellant's imagination and is merely fishing for something upon which to bottom a claim. It is an endeavor to compel the defendant and Mrs. Guido to disclose or discover a cause of action for the appellant. We respectfully submit that before the appellant's claim can be recog-

nized in the courts, against the appellee his bill must allege and show: First, that the fifty dollars a month was furnished to Mrs. Guido on her husband's credit and not on the credit of Mrs. Guido personally; second, the goods were supplied by the identical creditors which appellant presents and not by another; third, that Mr. Guido abandoned his wife and left her without means of obtaining the necessities of life (reasonable support); fourth, that the goods or merchandise was sold on credit as necessary family supplies and not as supplies for the mercantile business to be bartered and traded. *Gross v. Pigg*, 73 Miss. 85; *East v. King*, 77 Miss. 738, 21 Cyc. 1466.

The last contention of appellant is the right to recover any surplus of fifteen hundred dollars so borrowed that was not expended in the purchase of stock. As this proposition is based alone upon the question heretofore discussed, it needs no further argument on our part. Looking at the bill of complaint from all corners, we think there is no warrant for equity jurisdiction under section 553 of the Code of 1906, and certainly no jurisdiction is shown under the general equity rules without resorting to a statute. Therefore our second ground of demurrer that there is no equity on the face of the bill, "is, we believe, well taken, and the chancellor was correct in sustaining our demurrer and dismissing the bill. Counsel for the appellant on page ——— of his brief says, that if any ground of liability appears even though one or more grounds of liability set up may not be good, we must confess our inability to grasp the contention of appellant.

The principle is well established that if any one ground of demurrer is good against the entire bill, the demurrer will be sustained and the bill dismissed.

Without regard to the number of causes assigned, "if a demurrer to a bill is sustained upon any grounds whatever, the bill should be dismissed, unless leave be given to amend; and, until the amendment is made, the

demurrant is not called on to make any further defense.” *Davis v. Davis*, 62 Miss. 818; *Canton Warehouse Co. v. Potts*, 68 Miss. 637, 10 So.

The fifteenth ground of demurrer alleges that the bill shows the transaction to be between husband and wife for money and not for goods and chattels as contemplated by sections 2521 and 2522, Mississippi Code of 1906. It will be understood that, even admitting as a truth the allegation in the bill of complaint that Mr. Guido received the fifteen hundred dollars so borrowed as a loan on his wife's property, the transaction does not come within purview of section 2522 of Mississippi Code of 1906. The statute does not condemn the passing of money between husband and wife. This statute partakes of the character of a penal nature and should be strictly construed. It means what it says, “conveyance of goods and chattels.” It was undoubtedly the purpose of the legislature to prevent a fraud against creditors; it was not intended, however, to encourage fraud by creditors. *Kennington v. Hemingway*, 101 Miss. 259. The syllabus announces the law to be: First. Husband and wife, gifts, validity, Code 1906, section 2522: “Statutes, construction, intent. A gift by a husband to his wife of a personal ornament, clothing and wearing apparel suitable to her condition in life, is valid as against a third person, although “such gift is not evidenced by a written instrument, acknowledged and recorded as provided by section 2522, Code 1906. Second. Statutes, construction, legislative intent. In the construction of statutes, courts chiefly desire to reach the real intention of the framers of the law, and knowing this to adopt that interpretation which will meet the real meaning of the legislature though such interpretation may be beyond or within, wider or narrower, than the mere letter of the enactment.

As we said at the outset, section 2521 has no application to this case. Section 2521 contemplates and

anticipates a condition just such as it set out in that section and nothing more. The case at bar presents by the pleading no such possible condition as is covered by section 2521. Neither Guido, Sr., nor Guido, Jr., transacted any business by utilizing the plantation, houses, horses, mules, wagons, carts or other implements or any of Mrs. Guido's means to operate and carry on a business in his own name or on his own account. Appellee's demurrer, item 14 raises the very point which covers the case.

"14th." "That the bill on its face shows a transaction between husband and wife for money and not for goods and chattels as is contemplated by sections 2521 and 2522 of the Code."

Section 2522 has reference to the validity of conveyance and under the pleading no such question as that arises. There was no conveyance between Guido, Sr., and his wife. The only conveyance at all was between Guido, Jr., and his father.

Frank Guido, Sr., and his wife borrowed money, as we repeat, to start their son in business. The money was utilized for that purpose; their son was a failure; Guido, Sr., purchased his business with his own money, individually and personally, not as an agent of his wife, but for his own account and did not employ, as we have said before, any of her means in the business. And as both of the two sections referred to, exclude money transaction, we cite with every assurance, the case of *Leinkauf & Straus v. Barns*, 66 Miss. 207; *R. F. Waldin & Co. v. Yates*, 71 So. 897; *R. E. Kennington v. T. W. Hemingway, et al.*, 101 Miss. 259; *Groce v. Insurance Co.*, 94 Miss. 201; *Weir v. Jones*, 84 Miss. 606; *Hobbs & Buck v. Herman Grocery Co.*, 74 So. 26.

We respectfully submit that the court was correct in sustaining the demurrer and the case should be affirmed.



STEVENS, J., delivered the opinion of the court.

Appellant prosecutes this appeal from a decree sustaining a general demurrer to the bill of complaint filed by appellant as trustee in bankruptcy for the estate of Louise Guido against appellee, the husband of the bankrupt. The bill charges that Louise Guido filed a voluntary petition in bankruptcy and was adjudged a bankrupt; that appellant was elected and qualified as trustee; and that as trustee the complainant has a right to bring this suit in the interest of the creditors of the bankrupt. It is averred in the bill that for many years the defendant, Frank Guido, owned and operated a mercantile business on the Hall's Ferry Road in the suburbs of the city of Vicksburg; that this store, referred to as the Hall's Ferry Road store, was operated in the name of the defendant until May, 1914, at which time it was turned over to the bankrupt Louise Guido, the wife of the defendant, as her separate property. The bill charges that in 1914 the bankrupt and her husband procured a loan in the sum of one thousand five hundred dollars for Mrs. Guido and secured the loan by the separate real estate of the wife; that this loan was procured for the purpose of enabling the wife to open a store on Washington street in the city of Vicksburg; that accordingly the store was opened on Washington street with the proceeds of the said loan, and store fixtures and merchandise purchased with the money derived from the loan; that Frank Guido, Jr., the minor son of the defendant, was put in charge of the said store; that the son continued to operate the business for about six weeks, when it became apparent that he was incompetent to manage and operate the business; that thereupon the defendant and his said wife agreed to take the business operated on Washington street away from Frank Guido, Jr., and that the defendant should take charge of the same Washington street store as his

separate property, and that the Hall's Ferry Road store should be and become the property of the wife, it being verbally agreed and understood that the defendant would barter or swap the Hall's Ferry Road store to his wife for the Washington street store. The agreement between the husband and wife was a verbal agreement, and no writing whatever passed between them. It is charged in the bill that, at the time of this attempted transfer, the Hall's Ferry Road store was indebted to creditors in approximately the sum of one thousand dollars, and that this indebtedness equaled the value of the goods, wares, and merchandise on hand in that store; that the defendant about that time abandoned his wife and his home and ceased to support and maintain his family; that the wife supported herself from the Hall's Ferry Road store and the proceeds from sales at that store for a period of thirty-two months, and the bill seeks to recover for the wife's estate all moneys expended by her in the support and maintenance of herself and children during this period.

It is further charged in the bill that all of the one thousand five hundred dollars which was borrowed upon the joint and several note or obligation of the husband and wife was not expended in stocking the Washington street store, but that a portion of the proceeds of the said loan, the exact amount of which is unknown to the complainant, was left in the hands of the defendant and constitutes moneys in his hands belonging to the wife. The bill shows on its face that the defendant, Frank Guido, after assuming ownership of the Washington street store, proceeded to make new purchases of goods, wares, and merchandise, and replenished from time to time his stock, and was operating the said store at the time this suit was filed. It is charged that the verbal transfer or exchange of property between the husband and wife was void because not in writing in accordance with the statute, and that, so far as the credi-

tors of the wife are concerned, the Washington street store remains the property of the bankrupt and should be brought into the estate and administered by the bankrupt court for the benefit of creditors. There is a further charge that the bankrupt, after she assumed charge of the Hall's Ferry Road store, paid the merchandise indebtedness against that store, and the prayer of the bill is that an accounting be had between the husband and wife, that the defendant be given credit for the value of the merchandise in the Hall's Ferry Road store at the time his wife took charge of the same, and that he be charged with all such indebtedness paid by the wife for him on account of the first store; that a commissioner be appointed to take and state an account; that a receiver be appointed to take charge of the Washington street store; that a decree be rendered against the defendant for such sum of money as may be found to be due by him to his said wife; that the attempted sale or transfer be set aside and the Washington street store turned over to the trustee in bankruptcy; and for general relief. The grounds of the demurrer are numerous, but the principal grounds are: First, that there is no equity on the face of the bill; secondly, that the complainant has complete remedy at law; third, that this is no case for a discovery; fourth, that the allegations of the bill are vague and indefinite, and that the bill is a "fishing" bill.

For the purpose of denying any fraud and to enable the defendant to demur, an answer was filed. This answer does more than deny any imputation of fraud, and in fact controverts all the material averments of the bill. In testing the sufficiency of the bill on demurrer, we assume that the lengthy denials of the answer have no direct bearing upon the present issue. The appeal here is from a decree sustaining the demurrer.

As we construe the bill, its primary purpose is to set aside or have the court declare invalid the verbal

transfer of the Washington street store from the wife to the husband, and to recover the stock of goods at the Washington street store as the property of the wife and for the benefit of the wife's creditors. On this theory and upon this ground, we think the bill states a cause of action. Unquestionably, the trustee in bankruptcy has the right to sue in the interest of the bankrupt's creditors. The suit here is not in the interest of the wife, but for the benefit of the wife's creditors. In many respects the allegations of the bill are not specific. It is not shown how much of the original fixtures and stock of goods on hand at the Washington street store at the time of the verbal transfer still remains in the hands of the defendant. The Statute, section 2522, Code of 1906, plainly renders invalid this alleged transfer of the Washington street store "as against any third person." The creditors here of the wife have a right to attack this transfer whether they be antecedent or subsequent creditors, for, as said by our court in *Gregory v. Dodds*, 60 Miss. 549:

"Wherever the rights of any third person intervene, whether he be creditor or purchaser, and whether his rights accrued before or after the alleged transfer, no proof made in any other method than in that pointed out by the statute shall be received."

But the utmost effect of the statute is simply to render invalid the alleged transfer or conveyance. It is obvious, then, that the statute did not forbid the husband from making new purchases, from contracting in his own name, and from conducting and operating the Washington street store in his own name. The store fixtures and property on hand constituting the subject of the alleged invalid conveyance may be recovered by the wife's creditors, and in this case by the trustee. The bill, however, is subject to criticism in asking for more than the complainant is entitled to receive.

There is a strained effort to recover for the wife's estate moneys which she expended for the support and maintenance of herself and children during the period in which it is alleged the husband abandoned his family and his home. It is manifest that this is not a suit by the creditors supplying the wife with the necessities of life on the credit of the husband. The trustee is here presumably suing for those creditors who have sold and delivered to the wife goods, wares, and merchandise to be placed in her store on the Hall's Ferry Road—the mercantile creditors of the wife. Any equities of the creditors of the defendant Guido, those creditors who have sold and delivered to him goods, wares, and merchandise for the Washington street store after the defendant took charge and was operating the same in his own name and under a sign indicating his separate and complete ownership, are not here presented.

The right to sue in equity should be upheld under section 553, Code of 1906, and under well-recognized equitable jurisdiction. The present controversy and the rights of the parties can best be inquired into and taken care of in the chancery court. From the allegations of the bill it is manifest that the new stock purchased by the defendant has been commingled with the property that was on hand at the time the invalid transfer was made. The doctrine of wrongful commingling of goods would not apply in this case. There has been an attempt to transfer property in violation of the statute, and we see no reason why the chancery court should not have jurisdiction to cancel fraudulent conveyances between husband and wife, agreements which in *Kennington v. Hemingway*, 101 Miss. 259, 57 So. 809, 39 L. R. A. (N. S.) 541, Ann. Cas. 1914B, 392, are classed as "pretended transfers of property between husband and wife." It should be remembered that under the allegations of the bill the Washing-

ton street store was the separate property of the wife; that this property, by an unlawful agreement, was turned over to the husband; that a portion of the property yet remains in the hands of the husband, who in the operation of his business has commingled the old stock with the new; and that the rights of third parties are involved. It is manifest that the remedy at law would be more difficult than adequate, and that a court of chancery by a receiver or otherwise can adequately protect the rights of both husband and wife as well as the creditors of either. No injustice should be done the defendant in his ownership of any goods, wares, and merchandise purchased by him for the Washington street store in his own name and on his own account, and certainly no injustice should be done the creditors of the defendant selling the goods on the faith of his separate ownership of that business.

There is no merit in the contention of appellant that the defendant is liable for the indebtedness paid by the wife for and on account of the Hall's Ferry Road Store. The barter of the two stores as between the husband and wife was good. The only right of the creditors is to levy upon or take charge of the property in existence at the time of and constituting the subject-matter of the invalid transfer.

The decree of the learned chancery court will be reversed, the demurrer overruled, and the cause remanded, with leave to the defendant to answer within thirty days after receipt of the mandate by the clerk of the court below.

*Reversed and remanded.*

## KIRKPATRICK ET AL. v. FERGUSON-PALMER COMPANY.

[77 South. 803, In Banc.]

1. DEATH BY WRONGFUL ACT. *Recovery at common law.*

By the common law there could be no recovery of damages for the death of a human being.

2. DEATH. *Loss of services of child. Measure of damages.*

Even though the wrongful employment of a minor without the consent of his mother be an actionable wrong, the measure of damages under the common law would be no greater than would be the measure of damages if defendant were guilty of the wrongful or negligent killing of the boy. In other words without our statute, recovery would be limited to services lost during the minority and prior to the death of the child.

3. DEATH BY WRONGFUL ACT. *Negligence. Statutes.*

Chapter 214, Laws 1914, simply re-enacts or brings forward in amended form section 721, Code 1906, the only statute giving the right of recovery for injuries producing death. The essential nature of the recovery under the statute in its present amended form is the same under the Code of 1906. The true test of any right to recover under the statute is whether the deceased could have maintained an action had death not resulted so that if the servant would have no action against his master his next of kin could not sue under the statute.

APPEAL from the circuit court of Chickasaw county.

HON. J. L. BATES, Judge.

Suit by Lucretia Kirkpatrick and others against the Ferguson-Palmer Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

*Thos. E. Pegram and Jeff Busby*, for appellant.

We do not insist, nor did we so insist after the proof was in the lower court, that there was such negligence in the felling of the tree by the servants of the appellee as would entitle the heirs or legal representatives of Buddy Kirkpatrick to recover for the loss of his life.

The declaration as amended states a cause of action occurring to Mrs. Kirkpatrick by reason of the fact that the appellee employed her minor son without her consent and put him to work at a dangerous undertaking and in a dangerous locality and that he was injured while in said employment and in said place, said injuries resulting in his death, and that by reason of said events she lost the services of her son during his minority.

Opposing counsel, in urging that a parent cannot recover for the loss of services of a child when death is instantaneous if that loss results from the wrongful employment of the child against the parents' consent, cites a multitude of authorities, all of which we have not had the opportunity to examine; but an examination of those at hand demonstrates most conclusively the error into which he has fallen. He has failed to distinguish between an action brought by the parent for the death of the child against one who has negligently killed it, and an action brought by a parent against one who has wrongfully employed the minor child without the parent's consent and placed the child to do a dangerous work or work in a dangerous place whereby the child is injured or killed. In the one instance the gist of the action is the negligent killing, and in the other it is the wrongful employment. He has apparently overlooked the fact that the parent has a property right in the services of the child.

In *Braswell v. Oil Mill* (Ga.), 66 S. E. 539, we find this language: "Touching the services of an infant, it may be said upon the surest footings of reason and law the parent has his property right. In *Shields v. Younge*, 15 Ga. 356, 60 Am. Dec. 698, the question is asked and answered: 'May a father treat his minor son as his servant and sue for an injury to the son as for an injury to a servant?' If the son be old enough to render services he may. This statement is cited and approved in *Amos v. Atlantic, R. R. Co.*, 104 Ga. 809, 31 S. E. 42. In *Lewis v. McAfee*, 32 Ga. 465, the supreme



court decided that if one hired his slave to a railroad company for a particular service, and the latter used the slave for a different purpose of service, and an accident happened causing the slave's death, the railroad company was liable to the owner for the value of the slave; and the court in the course of the opinion places the case on the old and well-recognized common-law doctrine that the thing hired is used for a different purpose than that intended by the parties, etc. "That an employer putting a minor child, without the parent's consent to do work by which the child is injured, commits an actionable wrong, which will authorize the parent to recover for the loss of such services as he should have received during the child's minority, is a principle almost universally recognized wherever the common law prevails."

Our opponent admits that it is the rule in Georgia that in case of the death of the infant, the parent may recover the loss of the child's services for the wrongful employment, but with much assurance states that such is not the rule in any other state in the Union. If the logic of the Georgia court is sound, that the father has a property right in the services of his infant son and may treat such son as his servant, and that the rules of law governing the two relations are the same, then our own Mississippi court is in line with the former court holding that at common law a master may recover for the death of his slave where that slave was employed for a certain purpose and to work in a certain place, and was by the employer taken to another place which resulted in the slave's death. *Wallace v. Seales*, 36 Miss. 53.

In the case of *Haynie v. Power Company*, 157 N. C. 503, 73 S. E. 198, Ann. Cases, 1913C, which is a case where the boy was instantly killed the court, in referring to the editor's notes to the case of *Hendrickson v. Railroad Co.*, reported in 30 L. R. A. (N. S.) 311, said:

“the sum and substance of the many cases cited in those notes are that the general rule is that an employer, putting a minor servant, against his parent’s consent, to do work by which the child is injured, commits an actionable wrong for which the employer is liable, although there is no evidence of negligence on his (the employer’s) part. *Railroad Company v. Fort*, 17 Wall. 553, 21 U. S. (L. Ed.) 739, and cases there cited in Rose’s notes annotating this case.”

This was no statutory action on the part of Haynie. To our mind, however, the case which most satisfactorily disposes of the question raised and urged by appellee, is the case of *Williams v. Railroad Company* (Ala.), 9 So. 77. There the infant son of Thos. Williams had been instantly killed by the railroad company.

Under the Alabama statute, section 2590, of the Code which is in many respects similar to our own chapter 214, of the Laws of 1914, except that in case of death the right of action was vested in the personal representatives of the deceased and not in the father. In that case the father sued without qualifying as the personal representative, and the declaration consisted of several counts, some of which were for the negligent and wrongful killing of his son, and in these particular counts it was not negatived that the employment was with the father’s consent, and that since this was not done the father could not, under the common law, maintain his action. However, there were other counts of the declaration by which the father sued for the loss of services of his son, alleging that the son was employed without his consent to do the work of a railroad brakeman and was killed while about said work. This phase of the suit was brought under the common law and section 2588 of the statute which is most nearly in terms, chapter 214, Laws 1914, and the Alabama court held that those counts stated a good cause of action.

Of all of the cases cited in the brief of opposing counsel which we have had the opportunity to examine, the cause of action was brought by the parent for the death of the child without statutory authority, and in none of those cases, except the *Railroad Company v. Beal*, 61 Tex. 310, do we find that there were any allegations to the effect that the infant was employed without the consent of the parent. In fact, it appears from an examination of the authorities that the precise question here raised by appellee has not been passed upon so numerously, and that the Georgia, North Carolina, and Alabama courts have settled it according to our contention, and that the Texas court in the one case is favorable to the contention of the appellee.

The foregoing is stated in an effort to show that even at common law a parent could recover for the loss of services of his child during minority under the character of case in question.

In addition to the above we insist most earnestly that chapter 214, of the Laws of 1914, is sufficiently broad in its terms to enable Mrs. Kirkpatrick to maintain this suit for the loss of her son's services during minority.

The legislature has from time to time so changed and widened this particular statute, and has thereby so revolutionized the common-law rules as regards injuries resulting in death that there is hardly a conceivable case where a party could recover for injuries not resulting in death, yet would be deprived from recovery on the ground that death did result. To put the case differently, the legislature has, without leaving any room for question or quibble, abolished all distinctions, as to right of recovery, between those injuries from which death ensues and those from which it does not.

The court, of course, has the entire chapter in mind, but those parts thereof which particularly emphasize what is above stated are: "And the fact that death was instantaneous shall, in no case, affect the right of

recovery." . . . "All parties may join in said suit and there shall be but one suit which shall inure to the benefit of all parties interested." "In such action the party or parties suing shall recover such damages as the jury may determine to be just, taking into consideration all of the damages of every kind to the decedent, and all damages of every kind to any and all parties interested in said suit." It will be found that the learned trial judge, in rendering his opinion stated that Mrs. Kirkpatrick might maintain her action for the loss of the boy's services during minority under this section.

There can be but one suit, where injury results in death. *Foster v. Hicks*, 93 Miss. 219, 46 So. 533; *Mississippi Oil Co. v. Smith*, 95 Miss. 528, 48 So. 735. The case of *Natchez etc., R. R. Co. v. Cook*, decided in 1885, and cited by counsel for appellee as putting this question at rest in his favor turns out to demonstrate conclusively appellee's erroneous position, as will be seen.

Section 1510 of the Code of 1880 vested in the father alone the right of action for the death of a child, and did not vest such right in the mother. In the *Cook* case the mother brought the action for the injuries which resulted in the death of her son. These injuries were inflicted while said section 1510 was the law and before the section was amended in 1884, which amendment gave the mother as well as the father the right of action. Hence the court did hold that under the law at the time of the injury that no right was given the mother to maintain the suit for the services of the child from the time of his death until he would have become twenty-one years old. It is to be noticed, however, that that was not a case where the railroad company had wrongfully employed the infant son without his mother's consent. When the section was amended in 1884 it gave the mother the right of action and this has been the law down to the present time. Said sec-

tion as amended is now chapter 214 of the Laws of 1914.

The statement in the brief of our opponent to the effect that Mrs. Kirkpatrick has no cause of action unless her son, had he survived the injury, would have had one is not supported by any authority that we have examined. The right of recovery on the part of the son would have depended upon some negligent act of the appellee which resulted in the injury, in order for the mother to recover for the value of his services, since he was employed without her consent and put to work in a dangerous place, does not depend upon any negligent act of appellee causing the injury. In fact, the authorities cited in our original briefs and in this hold that she might recover under those circumstances even though the injury to the boy directly resulted from his own negligence.

We again urge, as in the original briefs, that the case should be reversed and a new trial ordered so that a jury might pass upon the facts as presented.

*R. H. Knox*, for appellee.

The undisputed evidence in this case, all of which was introduced by plaintiffs, shows that: (1) On September 13, 1915, defendant employed plaintiff's minor son, Robert Lee Kirkpatrick, as a "swamper" to trim around trees to be felled by defendant's cutting crew, and to trim up trees felled by the crew; and (2) at the time of his employment, said minor was eighteen years and three months old, and was large enough to be a man and in good health, and that he had been raised on a farm and had practical experience in raising crops and as a farm laborer and in hauling cross-ties and logs and having them sawed; and (3) that the duties of said minor to which he was assigned as a swamper were not within themselves dangerous or hazardous work for a person of said minor's age and health and

size and experience; and (4) that on September 16, 1915, said minor voluntarily and without the order, request, authority or knowledge of defendant or its foreman, and entirely outside the scope of his employment, took the place at the saw of one of the cutting crew engaged in felling a tree, who had stepped back to get a drink of water, and continued to saw until defendant's foreman appeared at the place and discovered him at said work and (5) that immediately upon his coming to the place and seeing said minor at the saw, the foreman informed said minor that sawing down trees was not his occupation and ordered him to let loose the saw and get out and warned him that the tree was about to fall and repeated the order and warning the third time, but said minor refused to obey the order and heed the warning and struck three or four more licks with the saw, and then let loose the saw and walked away three or four steps and then turned and looked at the tree, which at that moment fell upon him and crushed him to death; and, therefore plaintiff has no cause of action against defendant on account of the death of her said minor son, and defendant is in no manner liable to her for any loss, damage or injury resulting to her by reason of his death. *Mitchell v. McGee & Alford* (Supreme Court of Mississippi), 48 So. 234, 235, (decided Jan. 18, 1909).

*Chas. K. Wheeler*, for appellee.

An action commenced under chapter 214, of the Laws of 1914, of the state of Mississippi, providing that: "Whenever the death of any person shall be caused by any real, wrongful, or negligent act, or omission, or by such unsafe machinery, ways or appliances, as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof," can only be maintained where it is shown that death was occasioned by a real, wrongful, or negligent act.

If the person killed could not have maintained an action if death had not resulted, those authorized by the statute to sue for the destruction of his life cannot do so. If the life destroyed be that of an infant, the fact of infancy does not enlarge the sanction of the statute. The right to maintain an action under the statute depends upon a real, wrongful, or negligent act, arising in such circumstances as would have authorized the life destroyed to have maintained the action if death had not resulted.

The right of the parent to maintain an action for loss of services for injury to an infant child, grows out of the contractual relation created by law and is not dependent upon the statute.

One who interferes with the right of the parent to the services of an infant child, raises a cause of action in favor of the parent, but such right exists at common law and is in nowise dependent upon the statute.

At common law no action would lie for the death of a human being. The right to recover is purely statutory, and the circumstance that the life destroyed was that of an infant, in nowise enlarges the right to sue under the statute.

At common law no recovery could be had for interfering with the right of a parent to the services of a child where death was instantaneous. Cooley on Torts (Student's Edition), page 271; section 142; 24 Cyc., 1641; *Trow v. Thomas*, 41 Atl. 652; *Natchez, J. & C. R. Co. v. Cook*, 63 Miss. 38; *Gulf, Colorado & Santa Fe Railroad Co. v. W. T. Beal & Wife*, 61 Texas 310, 42 S. W. 1045; 41 L. R. A. 807; 66 Amer. State Repts. 892; *Mayhew v. Burns*, 103 Indiana, 328; *Thomas v. Union Pacific*, 1 Utah 231; *Eureka v. Merrifield*, 53 Kans. 794; *Lake Shore & M. S. R. Co. v. Orvis*, 12 Ohio, 710; *I. C. R. R. Co. v. Slater*, 129 Ill. 91, 6 L. R. A. 418; *Insurance Company v. Brame*, 95 U. S. 754; *Eden v. Lexington & Frankfort R. R. Co.*, 14 B. Monroe 204; *Covington Street Railway Co. v. Packer*, 9 Bush. 455; *Anderson*

v. *Arnold*, 79 Ky. 373; *Gregory v. Illinois Central R. R. Co.*, 26 Rep. 77; *Jackson v. Pittsburgh, C. C. & St. L. R. Co.*, 140 Ind. 241; *Sheffler v. M. & St. L. R. Co.*, 32 Minn. 125; *Kramer v. San Francisco Market Street R. Co.*, 25 Cal. 434; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *Lehigh Iron Co. v. Rupp*, 100 Pa. 98; *Baker v. Little Rock & Ft. S. R. Co.*, 33 Ark. 350; *Morgan v. Southern Pac. Co.*, 95 Cal. 510; *Edgar v. Costello*, 37 Amer. Rep. 714; *Davis v. St. L., I. M. & S. R. Co.*, 53 Ark. 117; *Brink et al. v. Wabash R. R. Co.*, 160 Mo. 87.

STEVENS, J., delivered the opinion of the court.

This is an action for damages instituted by Mrs. Lucretia Kirkpatrick, the mother, and certain named brothers and sisters of Robert Lee Kirkpatrick against appellee, Ferguson-Palmer Company, to recover damages for the alleged wrongful killing of the said Robert Lee, who at the time of his death was a minor and the eldest son of the said Mrs. Kirkpatrick. On the trial of the case the court excluded the plaintiffs' testimony and granted a peremptory charge in favor of the defendant. A motion to set aside the judgment and grant a new trial was by the circuit judge taken under advisement and overruled. From the adverse judgment appellants prosecute this appeal.

It appears that the deceased, Robert Lee Kirkpatrick, was employed by appellee as a "swamper." Defendant company was engaged in the sawmill business, in the prosecution of which it employed laborers to cut and fell large trees to be sawn into lumber. It was the duty of the deceased to trim up all trees felled by the cutting crew, and to clear up and remove obstructions around the trees which were to be cut. Robert Lee was employed by appellee without the mother's consent and was killed September 16, 1916, only three days after he was employed. Mrs. Kirkpatrick, the mother, is the sole surviving parent and her deceased son was about eigh-



teen years and three and one-half months old at the time of his death. The proof indicates that he was a boy of at least average size; that he was raised on a farm; that in the year 1915 he made a crop and "hailed cross-ties and hauled logs and had them sawed." The crew engaged in felling trees were busy sawing down a tree when an employee at one end of the saw stepped aside for a drink of water, and thereupon the deceased, without any request or direction from any one, took the employee Griffin's place at the saw. In a moment the foreman, Mr. Denton, observed the deceased in the act of sawing, and, according to the foreman's testimony, directed the deceased to turn loose the saw and get back out of the way. The boy did not heed this direction, and almost immediately after being ordered away from the saw the tree began to fall, and in falling the tree struck the deceased and killed him instantly. The testimony of the foreman was not materially contradicted. The foreman testified:

"I told Buddy Kirkpatrick to get out of the way, and he didn't. I says, 'Get back out of the way,' and he sawed on some two or three more licks, and the tree popped, and I hollered to him to get back out of the way again, and he made a turn to go, and I hollered a third time to get back out of the way."

At another point:

"I says, 'You get away from there; that ain't your place at all,' and I walked around the tree about six or eight feet from the tree and told him again, and says, 'You get back away from there and turn the saw loose. You haven't any business in there at all.'"

It appears further that all of the employees ran from the falling tree except the deceased, who walked. A full and complete statement of all the testimony is unnecessary, for the reason that in pressing the motion for a new trial and in the presentation of this appeal counsel for appellants concede their inability to recover damages for the negligent killing of the minor, but ear-

nestly contend that the suit should now be treated and viewed as an action by the sole surviving parent to recover damages for the loss of services of her minor son. In making this contention counsel argue that the measure of damages would be the loss of services from the time of the wrongful employment until the deceased would have become twenty-one years of age. It is conceded that the deceased was killed instantly. The position of counsel may be stated in their own language copied from the brief as follows:

"We do not now insist, nor did we so insist after the proof was in the lower court, that there was such negligence in the felling of the tree by the servants of the appellee as would entitle the heirs or legal representatives of Buddy Kirkpatrick to recover for the loss of his life. The declaration as amended states a cause of action accruing to Mrs. Kirkpatrick by reason of the fact that the appellee employed her minor son without her consent, and put him to work at a dangerous undertaking and in a dangerous locality, and that he was injured while in said employment and in said place, said injuries resulting in his death and that by reason of said events she lost the services of her son during his minority."

It is the contention of appellee, on the contrary, that at common law no action would lie for the death of a human being; that the right here to recover is purely statutory; that death was instantaneous; that the right to maintain an action under the statute depends upon a real, wrongful, or negligent act; and that the true test is whether the person killed could have maintained an action against the defendant company if death had not resulted.

It is useless to reiterate what has been, time and again, stated by all the courts that by the common law there could be no recovery of damages for the death of a human being. As stated by the supreme court of the

United States in *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754, 24 L. Ed. 580:

"The authorities are so numerous and so uniform to the proposition that, by the common law, no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. . . . By the common law, actions for injuries to the person abate by death, and cannot be revived or maintained by the executor or [by] the heir. By the act of Parliament of August 21, 1846, St. 9 & 10 Vict. an action in certain cases is given to the representatives of the deceased."

The act of Parliament referred to (Lord Campbell's Act) forms the basis for statutes which have been enacted in practically all the states of the Union. The right to recover, then, being statutory, resort must be had to the statute for the right, the remedy, and the measure of damages. The frank admissions of counsel for appellants narrow the issue here presented. There was no negligence in the felling of the tree, and consequently no negligence that can be regarded as a proximate cause of the death chargeable to the master. The suit is not one to recover damages for the loss of services from the time of the wrongful employment to the date of the boy's unfortunate death. Death was instantaneous, and the effort here is to recover for services which the mother expected to receive from her son during his minority. Her claim for these expected services, in our judgment, cannot be allowed. It may here be conceded that if the minor had been merely crippled or disabled, appellee would have been liable for services lost during the minority as a result of the injury. The death of the minor, however, terminates the relationship of master and servant, and after death it is evident there could be no services. In the present case the falling of the tree and the apparent negligence of the deceased constitute the proximate cause. Death intervenes and destroys the relationship of master and

servant, and after death no right of the mother is infringed, for the mother's right to services is gone. It might be speculation to assume that the boy would continue to live with his mother or to fix any time during which the services would continue. But aside from this, the law deals only with the living and, generally speaking, not with the dead; and the great weight of authority limits the master's right to recovery to those services accruing prior to the death of the servant, or, in this case, to those services of the boy accruing prior to his death. The argument of counsel seems to be divided into two main contentions: First, that the recovery here is based upon the common law altogether; and, secondly, upon both the common law and upon our amended statute (chapter 214, Laws of 1914). Many cases may be found holding that if the master employs a minor child without the consent of the parent and places him to work at a dangerous place, he is liable "for any injury as the result of being placed at such work." See on this point *Woodward Iron Co. v. Curl*, 153 Ala. 205, 44 So. 974; editor's note, 28 Ann. Cas. 234. No quarrel is here to be made with these authorities. The great weight of authority limits the measure of damages to those services accruing prior to the death of the child. Our court has long since indicated this to be the true rule. This measure of damages was indicated by our court in 1885 in *N. J. & C. R. R. Co. v. Cook*, 63 Miss. 38, which was a suit by the mother, as sole surviving parent, for the loss of services of her minor son, killed by the negligence of the railroad company. The court, by ARNOLD, J., said:

"Death did not result instantly from the injuries received by the deceased. As surviving parent, the mother was entitled to the services of her child, and, without reference to the statute she might sue for and recover at least the value of his services from the date of the injuries received by him to his death, and any incidental expenses she may have incurred for medical attention,

care, and nursing up to that time. She would have a remedy at common law, not for the death of the child, or for the injuries suffered by him, but for the loss of his services and incidental expenses, as above specified."

The Cook Case was reviewed by our court in *Amos v. Mobile & Ohio R. R. Co.*, 63 Miss. 509, and there differentiated from the Amos Case, the court repeating, however, that:

"It was held [in the Cook Case] that when the death of a minor child from injury inflicted by another was not instantaneous, the mother, without reference to the statute might sue at common law for damages occasioned by the loss of the services of the child and for incidental expenses incurred by her from the date of the injury which produced death to the time when the child died."

Later in 1884 the case of *Meyer v. King*, 72 Miss. 1, 16 So. 245, 35 L. R. A. 474, presented a suit by the appellant for loss of services of his minor son "resulting from his death by reason of the negligence, as alleged, of appellee, a druggist in the city of Vicksburg, in selling to said minor, in willful violation of section 1252, Code of 1892, chloroform, which, after such sale, he drank and died." It was held that the contributory negligence of the minor barred a recovery under the first count of the declaration, and that:

"The death cannot here be concatenated with the sale, as cause with effect, but is due to the new will of the minor intervening, and operating as an independent cause to produce it."

Conceding that the wrongful employment in the present case was an actionable wrong, the measure of damages under the common law could be no greater than would be the measure of damages if appellee were guilty of the wrongful or negligent killing of the boy. In other words, without our statute, recovery would be limited to services lost during the minority and

prior to the death of the child. Authorities on this point are abundantly collated in the notes to *Gulf, C. & S. F. Ry. Co. v. Beall*, 41 L. R. A. 807. The editor's note is upon the "common-law right of action for loss of services of child killed." The true rule is there stated in the notes as follows:

"While the Georgia rule, as shown by the Georgia cases set forth *supra*, would seem to be firmly fixed and well settled, it would appear that outside of that state the rule that there is no common-law right of action by a parent for loss of services of his child killed by the wrongful act of another must be regarded as the true doctrine."

The Texas court in the Beall Case quotes *Pigott, B.*, in *Osborn v. Gillett* (1873), L. R. 8 Exch. 88:

"It may seem a shadowy distinction to hold that when the service is simply interrupted by accident resulting from negligence the master may recover damages, while in the case of its being determined altogether by the servant's death from the same cause no action can be sustained. Still I am of opinion that the law has been so understood up to the present time, and, if it is to be changed, it rests with the legislature, and not with the courts, to make the change."

The conclusion reached by the court in that case is stated in the headnote as follows:

"The loss of services of a minor child killed by the fault of another does not give the parents any common-law right of action against the party in fault."

It is intimated by counsel that the case of *Wallace et al. v. Seales and Wife*, 36 Miss. 53, justifies a recovery here. That case, however, was a suit to recover the value of a slave hired for one purpose and improperly used for another. That case can have no bearing on the issues now presented. At the time that action was instituted a slave was property. Surely the deceased in the present litigation is not to be classed as property.

Is chapter 214, Laws of 1914, in aid of recovery here sought? This chapter simply re-enacts or brings forward in amended form section 721, Code of 1906, the only statute giving the right of recovery for injuries producing death. The essential nature of the recovery under the statute in its present amended form is the same under the Code of 1906. The true test of any right to recover under the statute is whether the deceased could have maintained an action had death not resulted. *Railroad Co. v. Pendergrass*, 69 Miss. 425, 12 So. 954; *Meyer v. King*, *supra*; *White v. Railroad Co.*, 72 Miss. 12, 16 So. 248; *Harris v. I. C. R. R. Co.*, 111 Miss. 623, 71 So. 878; *Foster v. Hicks*, 93 Miss. 219, 46 So. 533; *G. & S. I. R. R. Co. v. Bradley*, 110 Miss. 152, 69 So. 666. In *White v. Railroad Co.*, *supra*, the court says:

"The single question here is, could the son, had he survived, have maintained an action? If so, then, under paragraph 663, Code of 1892, the appellant can." *Meyer v. King*, [72 Miss. 1, 16 So. 245, 35 L. R. A. 474].

In *Hamel v. Railway Co.*, 108 Miss. 172, 66 So. 426, 809, it is said that:

"The right in the decedent to maintain the action is made a condition precedent for that given by the statute to the next of kin."

This holding was expressly reaffirmed by our court in *Harris v. Railroad Co.*, *supra*, holding that there can be no recovery where the deceased, while living, recovered final judgment for the injuries inflicted. When counsel, therefore, concede that there was no negligent felling of the tree, they place themselves out of court. The foundation of the right given by the statute is the "real, wrongful, or negligent act or omission, of the parties sued," or the use by the defendant "of unsafe machinery, way, or appliances as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action." The statute by express terms fixes the negligence or wrong of the defendant as the

basis for any recovery, and expressly limits the right of action to that kind of case which would entitle the injured party himself to sue for if living. Robert Lee Kirkpatrick, if living, would have no action at all against appellee. How, then, can it be said that his mother or next of kin may sue under the statute? It is plain that they cannot. That sentence in the amended act declaring, "This section shall apply to all personal injuries of servants and employees received in the service or business of the master or employer, where such injuries result in death," does not change the essential nature or object of the statute. This provision of the statute appeared in the Code section, and the purpose of the amendment by the Laws of 1914 was to enable the personal representatives of the deceased person to bring the action the same as the persons already authorized by statute to sue, even though the death be instantaneous. It is stated in Standard Encyclopedia of Procedure, vol. 6, p. 371, that:

"Notwithstanding the action is a new cause of action, under the statutes modeled after Lord Campbell's Act, it is generally provided by statute, or it is held by construction, that the action for wrongful death is only maintainable where the circumstances are such as would have entitled the deceased to recover for his injuries had he survived."

So it is that the rights of the mother must here be inquired into and measured just as if the statute did not exist. This fact appears to differentiate the case of *Williams v. Railroad Co.*, 91 Ala. 635, 9 So. 77, so much relied upon by appellants. It appears that the Alabama statute is there in aid of the recovery.

The authorities on the main points are too numerous to discuss or even to collate in a brief opinion. A few in addition to those discussed above and pertinent to the issue are as follows: *Trow v. Thomas*, 70 Vt. 580, 41 Atl. 652; *Sherman v. Johnson*, 58 Vt. 40, 2 Atl. 707;



*Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 793; *Thomas v. Union Pacific*, 1 Utah, 232; *Eureka v. Merrifield*, 53 Kan. 794, 37 Pac. 113; *I. C. R. R. Co. v. Slater*, 129 Ill. 91, 21 N. E. 575, 6 L. R. A. 418, 16 Am. St. Rep. 242; Cooley on Torts, (Student's Ed.), sec. 142, p. 271; Cyc. vol. 29, p. 1641.

*Affirmed.*

HOLDEN and ETHRIDGE, JJ., dissent.

ETHRIDGE, J. (dissenting). I am unable to agree with the conclusions of the majority in this case. The right of the mother, being the sole surviving parent in this case, to recover for the services of the child during minority is entirely distinct from the right of the child itself, in case it had not been killed and had brought the suit, and for the mother, brothers and sisters, as next of kin, to bring such a suit as next of kin. In case of the mother suing for loss of services, the action springs from the tort of the company in hiring the minor son of the appellant without her consent; and there is a direct causal connection between such wrongful hiring and the death of the son. In so far as the suit could be brought by the next of kin for the wrongful death, such suit would depend upon different principles and entirely separate rights, and be governed, of course, by different principles. It is also true that there is a separate right in the parent and in the child, to sue for injuries occurring, that are entirely independent of each other. It was held in *Westbrook v. Mobile, etc., R. Co.*, 66 Miss. 560, 6 So. 321, 14 Am. St. Rep. 587, that infants have legal rights distinct from their parents to security from personal injuries caused by the negligence or willful wrong of others; and the negligence of the parent is no excuse for the abuse or misuse of the child by another. In that case it was held that the contributory negligence of the parent could not be imputed to the child, where the suit was brought by or on behalf of the child, and

that its rights are separate and distinct from the rights of the parents, as parents, to recover on the same injury. Of course, the converse of this proposition would be true, and the parent's rights would not be affected by what might defeat the son's rights; and it is not true as held in the majority opinion, that the parent's rights depend upon the right of the child to have sued, had he lived, for the injuries. In 26 Cyc., p. 1583, under the heading "Damages," it is stated:

"The measure of damages for enticing away the servant of another, who is hired for a definite time, is the actual loss sustained by the master. If an entire loss of service during the balance of the term of employment is shown, the value of the services for all of such time is recoverable. In a proper case exemplary damages may be awarded."

At page 1582 of the same volume, under the heading, "Actions," it is said:

"An action for enticing away a servant is for a tort, and not for a breach of an implied contract. The common-law remedy by an action on the case is available, notwithstanding the existence of a remedy by an action for the penalty, as provided for by statute, where it is merely cumulative. The right to sue may be lost by failure to notify the third person of the prior contract of hire, or by a failure to comply with conditions precedent in the statute. If the complaint is for harboring or entertaining a servant, evidence of enticement is not necessary. Employment is *prima facie* evidence of enticement, inasmuch as it will be presumed, where one knowingly hires the servant of another, that the servant was enticed away. The general rules as to pleading, admissibility of evidence, and instructions to the jury applicable to civil actions in general govern an action for enticing away."

In 29 Cyc., p. 1642, subject, "Parent and Child," par. 10, it is stated:

“Separate Causes of Action of Parent and Child. An injury to a child gives rise to two causes of action, one on behalf of the parent, the other on behalf of the child; and the two causes of action cannot be joined. It follows that a recovery by the parent for the injury and loss which he has suffered does not bar a recovery by the child for the injury personal to himself; and conversely, a recovery by the parent on behalf of the child for the injury personal to the latter does not bar a recovery by the parent for his own loss and damages resulting from the injury. Neither is the commencement of an action by an infant by his father as next friend for personal services a waiver of the father's right to recovery for loss of services of the infant.”

On page 1643, Id., is the following:

“If the child is injured in the course of a dangerous service the employer is liable; but the mere fact that a child was injured while in the employ of a person by whom he has been employed without the knowledge of the parent does not render the employer liable in an action by the parent for the loss of the services of the child, where the employment was not hazardous and the injury was not due to the employer's negligence. A parent cannot, of course, recover against one who was not, in person or by his agent, the proximate cause of the injury.”

In the case of *Hendrickson v. Louisville, etc., R. Co.*, 137 Ky. 562, 126 S. W. 117, 30 L. R. A. (N. S.) 311, the Kentucky court of appeals held that the father may recover damages for injury to his minor son because of his employment without his knowledge as brakeman by a railroad company which knows of his minority, and the fact that the son assumes the risk of his employment, so that he could not recover for his own injury, is immaterial. This is an ably reasoned case, and we quote from the opinion the following:

“But in *Louisville & N. R. Co. v. Willis*, 83 Ky. 57, 4 Am. St. Rep. 124, which was a suit by the father to

recover for the wrongful interference with his infant son, a recovery was allowed. The court stating the basis of the ruling said: 'The conductor knew from his appearance that he was under age, and he received and used him. This was an exercise of dominion and illegal control over him, by the general agent of the appellant, at war with the father's rights. The appellant cannot shelter under the claim that it did not know that the appellee objected to the son rendering the service, since it was its duty to know that the appellee was willing to do it before it took control of him. The duty of the father to educate and maintain the son entitled the former to the son's services, and placed him in the attitude of a master to him, or created the relation of master and servant; and any interference with the master's right to control the servant by another renders the latter liable at least for any injury that was likely to result from such illegal conduct.' It is true that in that case there was only one brakeman on the train, but the opinion was not rested on this fact in any way. It was rested on the broader ground that there had been a wrongful interference with the father's rights. The same rule was applied in *Newport News & M. Valley Co. v. Carroll*, 17 Ky. Law Rep. 374, 31 S. W. 132. These decisions follow the common-law rule, which has long been recognized. See 29 Cyc. Law & Proc. pp. 1637, 1638, and cases cited. The conductor is the managing agent in charge of the train. While thus in charge of the train and having authority to control it, his act in taking and using the plaintiff's son upon the train, as between the plaintiff and the railway company, was the act of the railway company. The service of brakeman is peculiarly hazardous. The knowledge on the part of the conductor that the son was on the train and rendering service as brakeman was the knowledge of the defendant. The defendant could not, with knowledge of the father's rights thus expose the son knowingly to the dangers of such a

hazardous business without his consent. While the son took the risk of the work in which he voluntarily engaged, the father, who did not consent to it, was not affected by this."

In the present case the employment was very hazardous, and the quotation from the above case is peculiarly applicable. In the same opinion, further on, the court uses the following language:

"The plaintiff need not show that the conductor knew that he objected to his son rendering the service. It is sufficient if it was done without the plaintiff's consent. He must show that the conductor knew the son was under twenty-one years of age. But this he may show by circumstantial evidence or by direct evidence, as knowledge of a fact may ordinarily be shown by proof of facts sufficient to put a man of ordinary prudence on notice of it."

In the L. R. A. note to this case it is stated:

"It is a general rule that an employer, putting a minor servant, without his parent's consent, to do work by which the child is injured, commits an actionable wrong, which will authorize the parent to recover for whatever loss of services may result from the injury. In such a case the employer is liable although there was no negligence upon his part. *Marbury Lumber Co. v. Westbrook*, 121 Ala. 179, 25 So. 914; *Woodward Iron Co. v. Curl*, 153 Ala. 205, 44 So. 974; *Braswell v. Garfield Cotton Oil Mill Co.*, 7 Ga. App. 167, 66 S. E. 539;" and numerous other cases.

It is further stated: "So the doctrine of assumption of risk will not prevent a recovery (citing authorities). Nor is the minor servant's contributory negligence a defense to such an action (citing authorities). And the fellow-servant doctrine is not applicable (citing authorities)."

There are numerous authorities cited in this case note, and I think that the case and the authorities cited are peculiarly applicable to the facts of the case at bar.

In the case of *Haynie v. North Carolina Electric Power Co.*, 157 N. C. 503, 73 S. E. 198, 37 L. R. A. (N. S.) 580, Ann. Cas. 1913C, 232, it was held in that case, where, in an action for the death of a boy in the employment of the defendant the plaintiff based his claim upon a violation by the defendant of the contract of hiring by which the injury occurred, that the burden was on the plaintiff to show the breach of contract, and that it was the proximate cause of the child's death; and that a father who hires his son out may stipulate as to the kind of work his child may be employed in, unless prohibited by statute, and the consent of the parent that the child may be employed at one kind of labor is not a consent that he be placed in another and more dangerous work; as, where a person hired an infant as water carrier under an agreement with his father that he should be kept on a certain side of a river, and not allowed to go near the engines and machinery situated on the opposite side, he was bound to use due diligence to keep the child away from the machinery and at the work he was hired to perform, or to return him to his father, and a showing of his presence near the machinery with the knowledge of the defendant shows a violation of a duty to him which will support an action for his death. And in an action for the death of an infant, a showing of a failure of his employer to keep him away from dangerous machinery, as required by the contract of hiring, with knowledge of his habit of playing there, will permit the jury to infer that if the agreement had been carried out his death would not have been caused by such machinery, and is a sufficient showing of proximate cause to support a finding for the plaintiff. It was also held that, in such action, the contributory negligence of the child cannot be availed of as a defense.

In this state, I think the liability, so far as principle is concerned, is settled in the case of *Wallace v. Seales*, 36 Miss. 53. The majority opinion says that this case

has no bearing on the issues here presented: "that at the time that action was instituted a slave was property. Surely the deceased in the present litigation is not to be classed as property." I am unable to appreciate the distinction with which the majority sweep aside so lightly the announcement of this case. While a slave was a chattel, he was valuable only for the service which he performed; his value consisted entirely in his ability to perform service. A service performed by a child to its parents is no less valuable, and is no less a property right than the service of a slave, and the only distinction is that a slave could be sold, while a child may not be sold, but his services may be sold for a definite length of time and for a fixed consideration. In the case mentioned the ground depended upon for a recovery was that the hirer of the slave had improperly used and exposed them to a disease, because of which the slaves sickened and died. The court held that if the hirer of the slaves improperly used them, and that by reason of such improper use the slaves sickened and died, there was a right of recovery. Of course, this case is not a "grey-mule case" with the present one, but the principles underlying it are the same. It certainly seems to me that the law did not contemplate that a recovery could be had for the death flowing from a misuse of the servant and slave, and that the same right of action would not lie for the misuse and consequent death of a child. The foundation of the parents' right, as generally stated in the books, is founded upon the service of the child. I think the authorities relied upon in the majority opinion result from misconception of the principles underlying the right of the mother to recover for services by wrongful hiring. Our court, in cases where the personal representatives of the deceased are denied recovery where death is instantaneous, recognizes the distinction of the right of other persons than the deceased to recover for the injury resulting from the death.

The case usually relied upon to support the principle that no recovery can be had where death is instantaneous is *Railroad Co. v. Pendergrass*, 69 Miss. 425, 12 So. 954; and certainly this case is as strong as any case that can be found in the Mississippi reports for the principle announced by the majority in this case. But in that case, Justice Woods, in delivering the opinion of the court, expressly recognized the distinction, for, on page 431 of 69 Miss., page 955 of 12 So., we find the following:

"We are of the opinion that the personal representative has no right of personal action where the deceased never had such right, and that, where death was simultaneous with injury, it is impossible, to the healthy mind, to even conceive of a right of action in the man instantaneously killed. In such case, all recoverable damages must be sought by the kindred who have sustained loss, and the mere personal representative can have no standing in court."

At the time this decision was rendered we had no statute such as we now have, providing that all rights may be enforced in one suit, and that only one suit can be brought. When the facts of each case cited in the majority opinion are properly understood, and the principles of law applicable to the facts are applied, they do not conflict with my views of the present case. Our court has recognized that at common law an action lay for the wrongful hiring of a servant. In *Hoole v. Dorroh*, 75 Miss. 257, 22 So. 829, it is stated:

"At common law, if any person hired or retained the servant of another, and the servant was thereby caused to leave his master, the latter had an action for damages against both the hirer or retainer and the servant."

At page 264, of 75 Miss., page 830 of 22 So., Judge TERRAL quotes from 1 Blackstone, p. 429, as follows:

"If any person do hire or retain my servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for



damages against both the new master and the servant or either of them. The reason and foundation upon which all this doctrine is built seem to be the property that every man has in the service of his domestics, acquired by the contract of hiring and purchased by giving them wages."

In *Sowell v. McDonald*, 58 Miss. 251, this court held, in a case where an infant five years of age committed a violent and brutal assault and battery upon a child eighteen months of age, and the father of the latter caught the former and whipped him severely, and suit was brought by the next friend of the boy so thrashed to recover damages for the assault and battery, or whipping, that the father could recover from the person beating his child damages for the loss of services occasioned by such beating, and that a verdict for one hundred dollars would not be set aside; that although the provocation which occasioned the whipping was great, it would not justify a person in inflicting such punishment.

It seems to me there could be no question whatever of the right of the mother to recover for the services from the date of the hiring to the defendant to the date of the majority of the child killed in this case. The death of the boy was occasioned by his employment and there was a proper causal connection between the tort of wrongfully hiring the boy and the injury inflicted upon him which caused his death. I do not contend that the employer would be liable for every death that may befall a minor in his employ, because, under the authorities there must be a causal connection between the tort of the defendant and the death of the child. The boy was killed in this case while engaged in the service of the company, and was at all times while so employed by them within a danger zone. It was not only a tort in the present case to employ the boy without the mother's consent, but it is made a crime, and forbidden by

section 1080, Code 1906, section 807, Hemingway's Code, which is as follows:

"Any person who shall persuade, entice, or decoy away from its father or mother, with whom it resides, any child under the age of twenty-one years, if a male, or eighteen if a female, being unmarried, for the purpose of employing such child without the consent of its parents, or one of them, shall upon conviction, be punished by a fine of not more than twenty dollars, or imprisoned in the county jail not more than thirty days, or both."

It is well settled in the authorities that, where the legislature prohibits the doing of a thing, and a person violates the statute, that a right of action arises in favor of any one injured by such violation. *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, 88 S. W. 648, 5 L. R. A. (N. S.) 186, and authorities cited therein; *Wolf v. Smith*, 149 Ala. 457, 42 So. 824, 9 L. R. A. (N. S.) 338, case-note and authorities cited therein. See, also, *Haynie v. North Carolina Electric Power Co.*, Ann. Cas. 1913C, 232, above quoted, and authorities in the case-note appended thereto. It is stated in the case-note by the learned editors of this series:

"It is the general rule that an employer who employs an infant without his parent's consent, and requires him to do dangerous work in the performance of which the child is injured, commits an actionable wrong, for which the employer is liable, although there is no evidence of negligence on the part of the employer"—(citing authorities).

"One who employs a minor child without the consent of his father, and without such consent places him to work at a dangerous place or upon a dangerous work, is liable to the father for any injury suffered by the minor as the result of being placed at such work'" (citing authorities).

This note is a valuable demonstration of the position for which I contend in this case.

Again, it is settled in the authorities that, where a person employs a minor in violation of law, without the consent of the parent, it is negligence *per se*, and may be sufficient to justify a jury in finding negligence in the injury.

In *Rolin v. R. J. Reynolds Tobacco Co.*, 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 335, 8 Ann. Cas. 638, it is held that the employment of a child in a factory contrary to the provisions of a statute prohibiting the employment in factories of children under a specified age is very strong evidence of negligence. It was further held that if the owner of a factory is negligent in employing a child contrary to the prohibition of a statute prohibiting the employment in factories of children under a prescribed age, he cannot escape liability for injuries sustained by the child so employed because the accident was caused by the negligent act of a fellow servant, and that, while the negligence of the fellow servant may be the immediate intervening cause, the unlawful employment, continuing, is, in combination with the intervening act, a proximate cause of the injury. In the case-note to this case it is stated:

"There seems to be an apparent and rather equally balanced conflict in the authorities, not as to whether the act of employing a minor in violation of a prohibitory statute is evidence of negligence, but as to the weight of such evidence. The courts are uniformly agreed that the commission of such an offense is evidence of negligence. And the courts that refuse to go further than this state that the employment in violation of the statute is one fact to be considered in the establishment of the defendant's negligence, and that it 'is very strong, if no conclusive, evidence of negligence.' "

See, also, the authorities cited and referred to in this note.

In the case of *Stehle et al. v. Jaeger Automatic Machine Co.*, 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122, it was held that, under a Pennsylvania statute fixing the

age limit below which children shall not be employed in certain kinds of work, one employing a child under the statutory age in a prohibited occupation does so at his own risk, and in an action against the master for personal injuries sustained by a child in such employment, the defendant cannot set up as a defense either assumption of risk or contributory negligence; that the fact that a statute forbidding the employment of children below a certain age in dangerous occupations is penal, and makes provision for the punishment of its violation by fine or imprisonment, does not supersede a right of action for damages in a civil proceeding; and that the fact that such child was employed constituted evidence of negligence which, if found to have been the cause of an injury to such minor, authorized a recovery against the employer. This case, as reported in the Annotated Cases, has a case-note at page 123, containing many decisions upon the subject. From this note I quote the following, by the Indiana court:

“ ‘A causal connection between the unlawful employment and the injury of which complaint is made must be shown. If the child should die of some organic disease, or be injured by a stroke of lightning or other intervening act beyond the master’s control and not reasonably to be foreseen and anticipated, the master could not be held liable. The state has said in positive terms that employers must not take children under fourteen years of age into the service of their factories and subject them to the danger of being mangled or killed by machines propelled by the powerful agencies of steam or electricity. This mandate, it is alleged, appellant disobeyed, and appellee was injured in the mill, and by the agencies against which the law sought to protect him. The connection between the unlawful employment and the injury in this case is as direct as cause and effect, and brings appellant within the operation of the statute.’ ” *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229, 139 Am. St. Rep. 389.

In the same case-note is a quotation from *Starnes v. Albion Mfg. Co.*, 147 N. C. 556, 61 S. E. 525, 17 L. R. A. (N. S.) 602, 15 Ann. Cas. 470, wherein the court said:

“ ‘We do not mean to hold that the employer violating the act would be liable in damages for every fatality that might befall the child while in its factory. For instance, had the plaintiff died of heart disease, or from a stroke of paralysis, or been seriously injured by the willful and malicious act of a workman in knocking him against a machine, or injured from some cause wholly disconnected from the unlawful employment, the defendant could not be held liable in damages simply on account of the employment in violation of the statute. But we do hold that the employment, when willfully and knowingly done, is a violation of the statute, and that every injury that reasonably and naturally results is actionable. In this case the connection between the employment and the injury is that of cause and effect, and brings the defendant within the operation of the statute. It had no right to employ the boy. While in its employment and on its premises, in tampering, through childish carelessness incident to his years, with dangerous machinery, he was injured. Had he not been employed he would in all probability not have been on its premises, and not exposed to the temptation to meddle with dangerous instruments.’ ”

In the case of *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489, 95 N. E. 876, Ann. Cas. 1912B, 797, the court held that under a statute forbidding the employment of children under a certain age in any factory, etc., and imposing a penalty for any violation thereof, the penalty is not the only consequence of violating the statute, but a child who is injured thereby has a right of action against the wrongdoer, provided he shows that a condition to which the statute directly relates has a causal connection with his injury. It was also held in this case that the violation of a criminal statute is evidence of negligence on the part of the violator as to

all consequences that the statute was intended to prevent; and therefore, in an action by a child for injuries received while employed in violation of a statute regulating child labor, the negligence of the defendant employer is a question for the jury. In the Ann. Cas. report of this case there is a case-note at page 803, citing numerous authorities in support of the contentions of the appellant in the present case. I quote from page 807 of the Ann. Cas. note, as follows:

"It has been held that if the child is injured in the course of his employment, the unlawful employment is the proximate cause" (citing authorities).

The editor quotes from *Casteel v. Pittsburg Vitriified Paving, etc., Brick Co.*, 83 Kan. 533, 112 Pac. 145, where in the court said:

"The contention is also made that there was no evidence that the violation of the statute was the proximate cause of the plaintiff's injury. The jury were justified in finding, and must be deemed to have found, that the defendant unlawfully employed the plaintiff at an occupation that placed him in peril; that he was injured in the course of his employment in consequence of that peril; that what happened was one of the very things the statute was intended to prevent. Such findings established the necessary causal relation between the disobedience of the statute and the plaintiff's injury."

And again quoting from the note:

"The fact that at the time of his injury the child was acting outside of the scope of his employment has been held not necessarily to release the master from liability. *Frank Unnewehr Co. v. Standard L., etc., Ins. Co.*, 176 Fed. 16, 99 C. C. A. 490. In *Stehle v. Jaeger Automatic Mach. Co.*, 225 Pa. 348, 74 Atl. 215, 133 Am. St. Rep. 884, where the child was injured in attempting to do something which was no part of his duty, and which he had been expressly warned not to do, the court said:

'The effort on part of the defense was to show that, not only cleaning the pipe through this hole was no part of

plaintiff's duty, but that he had been specially warned not to attempt it, and much evidence was offered and admitted on this branch of the case. Let it be that these were the established and admitted facts. That they would be conclusive against an adult's right of recovery is unquestioned; but we are not dealing here with the case of an adult. The plaintiff is within a class of persons whom the law seeks to protect in the matter of their employment, because as a rule they are not able to adequately protect themselves. There can be no doubt that one of the chief purposes of the law in forbidding their employment in industrial establishments was to prevent their exposure to the danger of personal injury from the machinery used therein. If the danger in their case were only such as the adult is exposed to, there would be little justification for the law. It contemplates a special danger to persons of this class in connection with such employment, because of the characteristics incident to the immaturity of youth—imprudence, lack of judgment, heedless curiosity, and playfulness—and so it makes their employment unlawful. When a child has been employed in violation of law and is injured in the place where he is employed, to allow the employer to escape liability because the injury resulted from the imprudence or negligence of the child would be to defeat the purpose of the law and render it absolutely futile.' "

In the case of *Norman v. Virginia-Pocahontas Coal Co.*, 68 W. Va. 405, 69 S. E. 857, 31 L. R. A. (N. S.) 504, it is held by the supreme court of West Virginia that, a violation of the statute inhibiting the employment of boys under fourteen years of age in coal mines constitutes actionable negligence whenever that violation is the natural and proximate cause of an injury; that the violation of the statute is rightly considered the proximate cause of any injury which is a natural, probable, and anticipated consequence of the nonobservance;

that it was not all injuries that the master is chargeable with, but those that result during the unlawful employment against which the statute was intended to guard; that if the employment is unlawful, the servant cannot be held to have assumed the risks incident hereto, including the risk of injury by fellow servants. See, also, the case-note to *Rolin v. R. J. Reynolds Tobacco Co.*, as contained in the 7 L. R. A. (N. S.) 335.

It is true these statutes in many cases differ in terms from the statute in this state, but the trend of all the decisions is that if the injury or death resulted from employment and causes which the statute intended to prohibit or guard against, the right of the parent to recover exists. What is the purpose of a statute prohibiting people from enticing minors away from their parents, and what protection is intended to be afforded the parties by this statute? Manifestly and evidently the purpose of the statute is to preserve to the parent the right to have the control, custody, and services of his minor children during the period of their minority. In the case at bar, by reason of the wrong of appellee, the mother's right to the services and custody of her child was taken from her; and while he was so engaged in the service of the defendant thus unlawfully procured, his death resulted—from the wrongful hiring by the company. It is a manifest injustice that the parents can thus be deprived of the services and society of their children and no remedy be afforded them, because the deceased himself could not have recovered had he been living.

Again, I am unable to concur with the majority on the construction of the statute involved in this case. The statute involved is chapter 214, Laws 1914; section 501, Hemingway's Code. The language of the statute in the beginning is that:

“Whenever the death of any person shall be caused by any real wrongful or negligent act, or omission,” etc.



Was the death of this boy caused by any real wrongful act of the defendant? In other words, was the defendant guilty of any wrong that operated as a cause resulting in the death of the boy? If it be not a real wrong to employ a minor, without the consent of his parent, and put such minor in a dangerous occupation near and around where trees are being felled—not by one or a few men, but by a large crew of men—then my ideas of right and wrong are not very clear. It is not only a negligent act or negligent omission of the defendant that makes it liable, but it is “any real wrongful act” of the defendant having a causal connection with the injury that gives to the next of kin and relatives the right to bring the suit, regardless of the fact that death is instantaneous. On this point the opinion of the majority is too restrictive. They construe the statute with the strictness of a criminal statute, whereas it is in its very purpose and nature a remedial statute, and should receive a liberal construction for the purpose of effectuating the object of the legislature. It is difficult for me to see how there could be any distinction under this statute in cases where death was instantaneous and where it was not instantaneous. No one disputes the fact that the mother could have recovered for the loss of services occasioned by the injury if the son had been crippled and disabled instead of being killed outright. The purpose of the statute was to give the right of action in all cases where death ensued where there would be an action for the wrong or negligence or omission if death had not resulted immediately. Again, it is provided in this section that:

“This section shall apply to all personal injuries of servants and employees received in the service or business of the master or employer, where such injuries result in death.”

This clause makes it clear that the injury inflicted on servants or employees, where death is instantaneous, shall be actionable, and all persons having any right in

the life or services of the servant or employee should have that right perpetuated after the death of the employee. I think it is exceedingly unfortunate that we give so narrow and restricted an interpretation to the statute in this case. I can see no reason to infer from the statute that it intended to reserve any claims or rights that might be infringed by the wrongful killing of a person. I think the authorities will show that nearly all the states having similar statutes have given them a broader interpretation than the majority has placed on this one. The case of *Williams v. Railway Co.*, 91 Ala. 635, 9 So. 77, referred to in the briefs, gives such construction to the Alabama statute, which is less comprehensive and broad in its terms than our own statute. While Alabama held to the doctrine, in the absence of statute, that a right of action under the common law did not exist where death was instantaneous, yet when the legislature passed a statute designed to save the right of action after death, the court in the above case and in subsequent cases gave a liberal interpretation to the act, and held that it applied in cases substantially like this, where death was instantaneous. I could cite numerous authorities from several states on interpretation of the statute; but as these decisions, construing statutes of other states, would have but little influence with an appellate court in construing its own statute, I will refrain from protracting this opinion with the citations and quotations from such cases. The majority opinion seizes upon an admission of counsel made in this case as settling the law on certain principles of the litigation. While I would be reluctant to hold that an admission of counsel, in reference to facts, would not bind his client and the court, yet I do not think that it is fair to bind counsel by admissions on one branch of the case where you reject his views on the other branches of the case. In my own opinion, I think the statute prohibiting the employment of minors will be evidence of negligence, and would

distinguish the case of minors from the case of adults where they were killed without other negligence than that of employing them and putting them in a dangerous occupation. I think there are circumstances in the record, independent of the statute prohibiting employment, from which negligence could be inferred by a jury. The felling of the tree in question, which caused the death of the appellant's son, seems to have been done without regard to the known laws of nature and what experience ought to show any experienced timber cutter, in other words, the direction in which the tree was designed to fall had other trees so situated as to naturally cause the tree, in falling, to switch around in the manner it did; and this could certainly have been foreseen by a prudent manager. There is also evidence in the record that the foreman's direction to the boy, as claimed by him, was not heard by others standing at the place and in a position to hear it had he said what he claims to have said, and this presented a conflict for the jury's decision. There was also evidence that the deceased and those with whom he worked were habitually permitted—even directed—to assist in cutting trees when they were up with their own work. It is true this evidence is not as strong and clear as it might be, but, taking all the circumstances together, I see no reason why the case should not have gone to the jury, as to the rights of all parties, and this is especially true as to the right of the mother for the services of her son during the period of his minority.

# INDEX.

---

## ACCOUNT.

### *Set-off and counterclaim. Equitable set off. Accounting.*

In a suit for an accounting, where the bill asked the chancery court to take jurisdiction of all equities and matters of accounting between the parties, and the chancellor found that the amount due defendant on a note, secured by a trust deed on oxen, for which defendant had instituted a suit in replevin, was a specific amount, he should have allowed any amount due plaintiff to be set off against the amount due the defendant, so that either party could then plead in the circuit court where the replevin suit was pending, the decree of the chancery court relating to the matter. *Hebron Bank v. Gambrell*, 343.

## ACCOUNT, ACTION ON.

### 1. *Equity. Amendment of bill. Exhibits.*

Even though a copy of a probated account sued on should have been filed with and as an exhibit to the bill, still it was not error for the court to allow the bill to be so amended as to refer to the account which was then on file as an exhibit thereto. *Duffey v. Kilroe*, 7.

### 2. *Executors and administrators. Presentation of claim. Itemized account.*

Under Code 1906, section 2106, requiring an itemized account in probating a claim against the estate of a decedent, it is not necessary that a doctor's claim for visits to decedent should show the days of the month of such visits but where the visits are grouped on the account by months, the due date of each item will be held to be the first day of the month in which it is charged, in applying the statute of limitations. *Ib.*

### 3. *Payments. Application.*

Payments made upon an open account should be applied to the oldest items on the account, where neither party makes an application to any particular item. *Ib.*

## ACTION.

### 1. *Judgment. Equitable relief. Grounds. Defense not interposed.*

In such case since the agreement for reimbursement was by the corporation, and not by the secretary and general manager, the lessee though deprived of turpentine privileges on a part of the

---

ALIMONY—APPEAL AND ERROR.

---

## ACTION—Continued.

lands, had no cause of action against the widow of the secretary, for the only cause of action which could have been asserted against the manager, if living was one sounding in tort, based on trespass and no such action was maintained against him in his lifetime or against his estate after his death. *Dibert v. Durham*, 469.

2. *Death by wrongful act. Recovery at common law.*

By the common law there could be no recovery of damages for the death of a human being. *Kirkpatrick v. Ferguson-Palmer Co.*, 874.

3. *Death by wrongful act. Negligence. Statutes.*

Chapter 214, Laws 1914, simply re-enacts or brings forward in amended form section 721, Code 1906, the only statute giving the right of recovery for injuries producing death. The essential nature of the recovery under the statute in its present amended form is the same under the Code of 1906. The true test of any right to recover under the statute is whether the deceased could have maintained an action had death not resulted so that if the servant would have no action against his master his next of kin could not sue under the statute. *Ib.*

## ALIMONY.

*See* DIVORCE.

## ANIMALS.

*Tick eradication. Death of animals. Liability. Laws 1914, chapter 222. Construction.*

Laws 1914, chapter 222, providing for the dipping of cattle to eradicate ticks, and authorizing the board of supervisors on satisfactory proof to pay for damages suffered by the owner of the cattle in the process of dipping, is not a statute creating an absolute liability against the county, but is an enabling statute to authorize the board to pay such claims in any amount they may consider to be proper for such injury within the limits prescribed by the statute and when the board of supervisors disallow such claims the owner cannot recover from the county. *Horton v. Lincoln Co.*, 813.

## APPEAL AND ERROR.

1. *Matters reviewable. Matters not of record.*

The supreme court on appeal can only decide the case presented by the record. *Gavin v. Gavin*, 197.

---

 ASSIGNMENTS.
 

---

## APPEAL AND ERROR—Continued.

 2. *Harmless error.*

Error in rendering judgment against a connecting carrier for damages to live stock by the initial carrier without proof of identity of the two carriers is substantial error and not merely technical. *Illinois Cent. R. Co. v. Walker*, 431.

 3. *Harmless error. Instructions. Contributory negligence.*

In such case an instruction that the master must prove by a preponderance of the evidence that the servant had notice of the dangerous condition of the trap door through which he fell, was not prejudicial to the master's rights, since such instruction merely told the jury that the burden was upon the defendant as to contributory negligence. *Newton Oil Mill v. Spencer*, 568.

## ASSIGNMENTS.

 1. *Choses in action assigned after suit. Code 1906, section 718.*

Section 718, Code 1906, requiring assignments of choses in action sold or assigned after suit to be filed with the papers in suit, does not apply to an assignment of a judgment terminating the cause of action after suit; that statute was intended to regulate assignments of causes of action after suit and before judgment. *Pigford Grocery Co. v. Wilder*, 233.

 2. *Garnishment. Assignment of indebtedness before garnishment. Effect.*

Since the statute on garnishment provides that the indebtedness and effects in the hands of the garnishee are bound from the date of the service of the writ, where an assignment of judgment is made, before notice of garnishment is served on the judgment debtor such assignment takes preference over the garnishment. *Id.*

 3. *Usury. Recovery of usurious interest. Rights of assignee.*

Where usurious interest was paid to a bank by a partnership, it was recoverable by one of the partners to whom the partnership account with the bank, together with all charges of every character, except items specifically excluded, were transferred and assigned on a settlement and dissolution of the partnership, since in such case he stood in the place of the partnership. *Hebron Bank v. Gambrell*, 343.

 4. *Mortgages. Deeds of trust. Assignment of debt. Recording. Code 1906, section 2794.*

Where the transfer of the record debt was in form a transfer of the deed of trust, yet looking through form to substance, it is clear that it was intended as a transfer of the debt, which carries with it the security and this appears of record as re-

---

 ATTORNEY AND CLIENT—BANKS AND BANKING.
 

---

## ASSIGNMENTS—Continued.

quired by section 2794, Code 1906 (Hemingway's Code, section 2295), it was sufficient. *West v. Union Naval Stores Co.*, 743.

5. *Corporations. Assignment of secured debt. Seal.*

The assignment, by a corporation of a debt secured by a deed of trust, is not required to be made under seal. *Ib.*

See **BILLS AND NOTES; JUDGMENTS; MORTGAGES.**

## ATTORNEY AND CLIENT.

1. *Compensation. Compromise.*

Where the board of supervisors of a county contracted to pay attorney's compensation only in the event that they successfully resisted the payment of certain county warrants and the circuit court in which the suit was brought to collect such warrants decided adversely to the county, and the board of supervisors of the county, over the objections of the attorneys who had taken an appeal, compromised the case. In such case the attorneys were not entitled to compensation, since the litigation did not terminate successfully for the county according to the terms of the contract with the attorneys. *Lamar County v. Tally & Mayson*, 588.

2. *Same.*

In such case the board of supervisors had the right to control the litigation and dismiss the appeal and compromise the suit, if it deemed it advisable, and it must be assumed where the record is silent as to the matter, that the determination by the circuit court adverse to the county's interest was correct. *Ib.*

## BANKS AND BANKING.

1. *National banks. Ultra vires contracts.*

A national bank cannot be held liable for acts in excess of its charter powers and such bank is not estopped to plead *ultra vires* in defense of any unlawful contract. *U. S. Fidelity Co. v. First State Bank*, 239.

2. *Same.*

A national bank that executes a contract even beyond its powers, but receives funds or property by virtue of such contract, is liable to the extent that it has received funds or property or has received benefits from such *ultra vires* contract. *Ib.*

3. *National banks. Powers. Indemnity.*

Where a state bank being unable to make the bond required as a county depository a national bank procured a surety for it, and in consideration of the execution of the bond, the national bank

---

BANKS AND BANKING.

---

## BANKS AND BANKING—Continued.

agreed with the surety to have all funds covered by the bond deposited by the state bank with it, and to execute certificates of deposit and cause the same to be indorsed to the surety, to be held as collateral, and in the event of the failure of the state bank to pay, etc., to indemnify the surety against all loss. In such case the contract was not beyond the powers of the national bank under Rev. St. U. S., section 5136 (U. S. Comp. 1916, section 9661), with reference to the powers of national banks. *Ib.*

4. *Title to funds. Duty of surety.*

Where a national bank, having undertaken to cause money sent to it by a state bank received under a depository bond to be handled in a particular way calculated to safeguard the surety on the depository bond, it cannot escape liability on the theory that it did not receive notice that a second bond issue had been made, or that the funds received by it from the state bank were funds belonging to the road district since in assuming this obligation, it assumed an obligation to keep in touch with the affairs of the depository and to know the character of the funds it received from the depository. *Ib.*

5. *Stockholders. Double liability. Time to sue.*

Under Laws 1914, chapter 124, section 59, imposing a double liability upon the stockholders of a bank, the obligation of such stockholders is a primary and not a secondary liability and a suit against them may be maintained whenever it is reasonably apparent that the assets of the bank will not pay the depositors and there is no requirement to await a collection and application of the debts and property of the bank before bringing such suit against the stockholders. *Pate v. Bank of Newton*, 666.

6. *Increasing liabilities of stockholders. Constitutionality.*

Where a bank was chartered under the general laws of the state at a time when the Constitution expressly provided that all such charters could be repealed or amended by the legislature whenever in the judgment of the legislature it was for the public interest to do so, provided no injustice be done to the stockholders, no injustice was done such bank by Laws 1914, chapter 124, section 59, which while increasing the liability of a stockholder of the bank to the extent of the par value of his stock, at the same time guaranteed payment of depositors by the state. *Ib.*

7. *Increasing liability of stockholders. Statute. Application.*

The liability of the stockholder of a bank, as to deposits, accrues with the making of the deposit, and not of the date of granting a charter to do business, while Laws 1914, chapter 124, section



---

BANKRUPTCY.

---

## BANKS AND BANKING—Continued.

59, increasing the liability of stockholders of banks, imposes liability upon the stockholders of banks incorporated before as well as after its passage, it applies only as to deposits actually made after its passage. *Pate v. Bank of Newton*, 666.

8. *Constitutional law. Right to raise question. Acceptance of statute. Banks and banking.*

Where the stockholders of a bank expressly authorized its directors to accept the depositor's guaranty act (Laws 1914, chapter 124, section 59) and held out this inducement to depositors to secure deposits, they are in a poor position to claim exemption from the effect of what they voluntarily did. *Id.*

9. *Same.*

Section 59, chapter 124, Laws 1914, imposes liability upon the stockholders of banks whether incorporated before or after the banking act was passed, but this liability does not extend to deposits which were actually made before the passage of the act. As to deposits made prior to the passage of the act, the stockholder's liability will be measured by the law in force at the time of the making of the deposits which constitutes the contract between the bank and the depositor. *Id.*

10. *Decreasing capital stock. Injustice to stockholder.*

An amendment to the charter of a bank reducing its capital stock from thirty-five thousand dollars to twenty-five thousand dollars does no injustice to a stockholder, where he is offered new stock under the amended charter which is of the same actual value, though a less number of shares, as the stock held by him in the bank before its capital stock was reduced by the amendment. *Perry v. Bank of Commerce*, 838.

See TAXATION.

## BANKRUPTCY.

1. *Transfer in violation of state law. Right of trustee.*

Under Code 1906, section 2522, so providing a transfer or conveyance of goods and chattels or lands between husband and wife is not valid as against any third person unless in writing, and acknowledged and filed for record, and a married woman's trustee in bankruptcy may recover for the benefit of her creditors a stock of goods transferred verbally by her to her husband. *McCabe v. Guido*, 858.

2. *Transfers in violation of state laws. Rights of trustees in bankruptcy.*

Where a wife made a verbal sale of a stock of goods and fixtures to her husband in violation of section 2522, Code 1906, this did

---

BANKRUPTCY.

---

## BANKRUPTCY—Continued.

not forbid the husband from making new purchases, nor from contracting in his own name, nor from conducting and operating the store in his own name. The store fixtures and property on hand constituting the subject of the alleged sale, may in such case be recovered by the wife's creditors or her trustee in bankruptcy. *Ib.*

3. *Transfers. Rights of trustee.*

The trustee of a married woman in bankruptcy, was not entitled to recover from her husband the amount expended by her for the support and maintenance of herself and children during her husband's abandonment of his family, where the trustee was presumably suing only for creditors who had sold and delivered to the wife goods for mercantile purposes and not for creditors who supplied the wife with the necessities of life on the credit of her husband. *Ib.*

4. *Suits by trustee. Nature and form of remedy.*

Under section 533, Code 1906, giving the chancery courts jurisdiction of suits by creditors to set aside fraudulent conveyances, where a wife owning a store as her separate property verbally exchanged it for a store owned by her husband, and the husband purchased a new stock of goods for the store taken by him, which had been commingled with that on hand in the store of the wife at the time the invalid transfer was made. In such case the wife's trustee in bankruptcy could sue in chancery to recover the property transferred, and still remaining in the hands of the husband, since only a court of chancery could adequately protect the rights of both husband and wife and the creditors of each. *Ib.*

5. *Confusion of goods. Application of doctrine.*

In such case the doctrine of wrongful commingling of goods did not apply. *Ib.*

6. *Transfers. Rights of trustees.*

Where a married woman verbally exchanged a store and stock of goods owned by her, as her separate property, for a store owned by her husband, and paid an indebtedness on account of the store taken by her from her husband, the trustee in bankruptcy of the wife could not hold the husband liable for such payment by the wife, since the exchange was good as between the husband and wife, and the only right of the creditors was to levy upon or take charge of the property in existence at the time of and constituting the subject-matter of the invalid transfer. *Ib.*

---

BENEFICIAL ASSOCIATIONS.

---

## BENEFICIAL ASSOCIATIONS.

1. *Rights of subordinate lodges.*

Where in the by-laws of a Grand Lodge there was a provision that whenever a lodge shall become extinct, its property shall escheat to the Grand Lodge, and the same shall be sold and the proceeds applied to the payment of the lodge debts, and any residue credited to the grand lodge charity fund, such a provision is a regulation and not a contract between the grand and subordinate lodges, and will be construed most strongly against the Grand Lodge which enacted it and most favorably to the subordinate lodge and will not be construed to mean that the Grand Lodge can arrest or forfeit the charter of a subordinate lodge and by such act acquire the property belonging to such lodge. *Vicksburg Lodge v. G. L. of F. & A. M.*, 214.

2. *Same.*

The meaning of such a provision is that if from the negligence of the members of the subordinate lodge it ceases to exist or if for any reason they voluntarily surrender their charter and go out of business only in such case will the title to their property be vested in the Grand Lodge as a trustee for the purpose of paying the debts of the defunct lodge and devoting the remainder to the purpose of masonic charity. *Ib.*

3. *Unconscionable rules.*

Equity will not lend its aid in enforcing a forfeiture of the charter of a local lodge for some contumacy or misconduct of a subordinate lodge. *Ib.*

4. *Lodges. Power of subordinate lodge.*

A local lodge of the Grand Masonic Lodge which had become incorporated by the statute of the state empowering it to acquire and hold property, and giving it perpetual succession, cannot be deprived of its property by a revocation of its lodge charter by the Grand Lodge, which is without power to destroy a local lodge as a corporation of the state. *Ib.*

5. *Lodges. Forfeiture of charter. Presumptions.*

As under the laws of the land every person and corporation is entitled to resort to the courts, for redress of any grievance affecting reputation and property under section 24 of the Constitution of the state and as under section 25 of the Constitution no person can be debarred from prosecuting and defending in any civil cause, and as under section 14 of the state Constitution, and the fourteenth amendment to the Federal Constitution no person can be deprived of life, liberty or property without due process of law, the court is bound to assume, in the ab-

---

BILLS AND NOTES—BURDEN OF PROOF.

---

## BENEFICIAL ASSOCIATIONS—Continued.

sence of specific allegations and proof to the contrary that the grand lodge in forfeiting a charter of a subordinate lodge acted in accordance with its rules and proceeded from adequate cause. *Ib.*

*See* INSURANCE.

## BILLS AND NOTES.

1. *Rights. Promissory notes. Gifts inter vivos. Validity.*

Where a testator executed a demand note which was intended to evidence a mere gratuity, and delivered it to the payee, but such note was not in fact intended to be paid and was not paid before the maker's death, such a note cannot be upheld as a gift *inter vivos*. *Woods v. Sturges*, 412.

2. *Right of parties.*

If the original payee of a note released the maker in consideration of a deed to the payee's wife and this was known to the assignee of the note who was a mere volunteer, then the maker was entitled to a cancellation of the note and trust deed. *Bass v. Barries*, 419.

## BONDS.

1. *Counties. Sale of road bonds. Obligation of buyer. Payment.*

It is the duty and obligation of bond buyers to pay for bonds in actual money, in the absence of an express statute authorizing the taking of something other than money in payment of bonds; but where a check is accepted in payment and actually paid into the proper depository of the county, it will be treated as payment. *U. S. Fidelity Co. v. First State Bank*, 239.

2. *Counties. Sale of road bonds. Payment by notes.*

A county depository was not authorized to take as payment for road bonds the individual notes of its officers, held by the purchaser. *Ib.*

3. *Counties. Sale of road bonds. Payment by checks.*

Where a state bank, being a county depository, received a bond issue of a road district of the county, for delivery to a purchaser, and received a check from the purchaser as an advance payment and the check was afterwards paid, this constituted a payment on the bond purchase. *Ib.*

## BURDEN OF PROOF.

*Constitutional law. Validity of act.*

If the question of whether or not there was a publication of Laws 1902, chapter 80, with reference to the levy of privilege taxes

---

CARRIERS.

---

## BURDEN OF PROOF—Continued.

by the levee commissioners, as required by Constitution 1890, section 234, is entertainable in the courts, it would require the party attacking the law to prove such fact by sufficient evidence. The burden of proof would be on the party alleging there was no publication to prove this fact beyond reasonable doubt or by clear and convincing testimony. *Tel. & Cable Co. v. Robertson*, 204.

*See* CARRIERS; EVIDENCE; PERPETUITIES; WILLS.

## CARRIERS.

1. *Shipments of live stock. Notice of loss.*

Where under a contract for shipment of live stock, there was a provision requiring notice of claim for damages within one day after delivery at destination, as a condition precedent to a right of recovery, such provision was sufficiently complied with, where before accepting the shipment of stock at destination, the shippers required the agent of the terminal carrier to note on the freight bill that "shipper received stock under condition stock in bad shape account overrun and lack feed and water." *Ill. Cent. R. Co. v. Rogers & Hurdle*, 99.

2. *Damages to stock. Time for bringing suit. Waiver.*

Where in the correspondence between the shipper and the carrier in reference to a claim for damages to a stock shipment, there was no reference to the six months' limitation for bringing suit contained in the bill of lading, or extension of time granted or requested, in such case there was no waiver of such limitation by the correspondence. *Ib.*

3. *Carmack amendment. Applicability.*

The Carmack Amendment applies although suit is not against the initial carrier, based on the bill of lading, but against the connecting carrier. *Ib.*

4. *Bills of lading. Shortening time for suit.*

The provision in a bill of lading on an interstate shipment of mules, requiring suit to be brought for damages within six months, was valid and binding and under the evidence in this case was not waived by the carrier. *Ib.*

5. *Evidence. Admission. Stipulations as to liability of shippers.*

The signing by shippers of a bill of lading stating that they have had the option of shipping at carriers' risk at a higher rate, but have elected to make a contract stipulating that suit must be

---

CARRIERS.

---

## CARRIERS—Continued.

brought within six months and accept the lower rate, is an admission that they were offered by the initial carrier, two separate contracts, and that they chose the one containing the stipulation in consideration of the reduced rate. *Ib.*

6. *Stipulations as to liability. Burden of proof.*

In such case, before the shippers can avoid the stipulations in the contract the burden of proof is upon them to show that they were not offered the choice of rates referred to in such contract, the recitals in the contract being *prima-facie* evidence of the fact that this choice was offered the shippers. *Ib.*

7. *Evidence. Admissions in bill of lading.*

Testimony that the shippers accepted and signed the conditional bill of lading without reading it is not sufficient to contradict written admissions contained therein that the shippers were offered choice of rates depending on the liability of the carrier. *Ib.*

8. *Passengers. Statutory presumptions. "Running." Code 1906, section 1985. Laws 1912, chapter 215.*

Under Code 1906, section 1985, as amended by Laws 1912, chapter 215, providing that in all actions against railroad corporations and all other corporations, companies, partnerships, and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline, or lever power and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, etc., shall be *prima-facie* evidence of the want of reasonable skill and care, and that the section shall apply to passengers and employees of railroad corporations and other such corporations, etc. The word "running" is not to be literally applied, for otherwise the statute might be given an absurd construction but "run" should be treated as equivalent to the word "operate" and hence the section applies to a passenger on an interurban electric car who was standing on the back platform while the car was stationary awaiting a clear track and was injured by a shock received from the controller of the car upon which he was standing. *G. & M. Coast Traction Co. v. Hicks*, 164.

9. *Carriage of passengers. Presumption. Res ipsa loquitur.*

Where a passenger on an electric car received a shock while leaning against a controller, and such shock was ordinarily im-

---

 CARRIERS.
 

---

## CARRIERS—Continued.

possible in the absence of negligence, a presumption of negligence on the part of the carrier arises under the doctrine of *res ipsa loquitur*. *G. & M. Coast Traction Co. v. Hicks*, 164.

10. *Live stock. Filing claim of loss. Waiver of stipulations.*

The provision of a contract for the shipment of live stock, that the shipper shall file notice of loss within ten days of delivery is waived where the proper agent of the carrier received and accepted oral notice, acted upon it, and inspected the injured stock shortly after their arrival, and made notation upon the way bill of the injuries and damages to the stock at the time. *Bernstein v. Yazoo & M. V. R. R. Co.*, 382.

11. *Live stock. Loss in transit. Burden of proof.*

Where a shipper of live stock sued a connecting carrier for damages arising from delay in an interstate shipment of stock, and charged in his declaration that his contract for shipment was made with the defendant carrier through the initial carrier, and the defendant carrier filed the general issue and *non assumpsit*, in such case the burden of proof was upon the shipper to show that the contract was made as alleged in his declaration. *Illinois Cent. R. Co. v. Walker*, 431.

12. *Live stock loss. Liability. Connecting carrier.*

Damages to live stock in an interstate shipment, cannot be recovered against a connecting carrier where the proof conclusively shows that the damage was done by the initial carrier. *Id.*

13. *Live stock. Loss in transit. Burden of proof. Code 1906, sec. 1974.*

Code 1906 section 1974, providing that proof of signature of written instruments shall be unnecessary unless denied under oath is inapplicable where an interstate live stock shipper alleged in his declaration the execution of a contract with the defendant, a connecting carrier, which failed to deny such allegation, and this section did not remove the burden of proof of the execution of such contract from the shipper where the bill of lading on its face was made alone by the initial carrier. *Id.*

14. *Carriage of passengers without tickets. Excessive fares. Code 1906, Sections 4842-4843.*

Where the railroad commission, acting under authority given by Code 1906, sections 4842-4843, fixed a maximum rate that may be collected from passengers boarding trains at stations where tickets are on sale, carriers may yet require a higher rate from passengers not having secured tickets than from those who have, but cannot collect more than the maximum rate

---

 CHATTEL MORTGAGE.
 

---

## CARRIERS—Continued.

fixed by the commission. *Ill. Cent. R. Co. v. Miss. R. R. Com.*, 484.

15. *Railroad commission. Reasonableness of order fixing fares. Code 1906, Section 4055.*

Code 1906, section 4055, making it unlawful for railroads to collect more than the regular fare from passengers who board trains at places where tickets are not offered for sale was not intended to control the railroad commission in fixing maximum rates, and an order by the commission, making the maximum ticket rate and the maximum train rate each at three cents a mile, is not unreasonable and void. *Ib.*

---

 CHATTEL MORTGAGE.
 

---

1. *Security to landlord. Receivers.*

Where a landlord takes a trust deed from his tenant to cover advances with which to make a crop, but immediately refuses to make the advances, such trust deed cannot be used as a basis for the appointment of a receiver, although it recites that it is to be also supplemental security for a balance due under a deed of trust for the preceding year, where the tenant acquiesces in the refusal of the landlord to furnish the advances and offers possession of the premises; since such acts are in effect a cancellation by agreement. *Burton et al. v. Pepper et al.*, 139.

2. *Insolvency. Grounds for appointment of receiver.*

A landlord cannot take a deed of trust from his tenant to secure advances, and then refuse to make the advances and have a receiver appointed, although the tenant be of limited means and practically insolvent, unless he had the fraudulent intent of misappropriating the funds or was abandoning the property. *Ib.*

3. *Landlord and tenant. Receivers. Grounds for appointment. Deed of trust. Foreclosures.*

To justify a receiver in a foreclosure suit there should be a clear showing of inadequacy of the security, the insolvency of the mortgagor, and a present need for the preservation and management of the mortgaged property; also that the tenant had either, removed or abandoned the premises or was misappropriating the property and placing it beyond the jurisdiction of the court, or doing some other act tending to destroy the value of the security. *Ib.*

See LANDLORD AND TENANT.



---

 CODE 1906.
 

---

## CODE 1906.

- §§ 1, 2 (1914, sec. 7357) 3416, 3419. Schools and school districts. Consolidation. Bond issues. *Price v. Sims*, 687.
- § 721. Death by wrongful act. Negligence. Statute. *Kirkpatrick v. Ferguson-Palmer Co.*, 858.
- § 625. Receiver. Appointment. Notice. Necessary. Good cause. *Buxton v. Pepper*, 139.
- § 718. Assignment. Choses in action assigned after suit. *Pigford Grocery Co. v. Wilder*, 339.
- § 741. Pleading. Set-off. *Weil Bros. v. Wittjen*, 514.
- §§ 899, 901. Banks and banking. Decreasing capital stock. *Perry v. Bank of Commerce*, 838.
- § 935. Commerce. Sales. Interstate transactions. *Union Cotton Oil Co. v. Patterson*, 812.
- § 1309. Officers. Removal from office. Indictment. Sufficiency. *Pruitt, Constable v. State*, 33.
- §§ 5037 (1860). Colleges and Universities. Power to lease lands. *State v. Hamilton*, 697.
- §§ 1956, 1957. Evidence. Documentary evidence. Certified copies. Admissibility. *Currie v. Vemer*, 187.
- § 1985. Carriers. Live stock. Loss in transit. Burden of proof. *Illinois Cent. R. Co. v. Walker*, 432.
- § 1985. Carriers. Passengers. Statutory presumptions. Running. *G. & M. Coast Traction Co. v. Hicks*, 164.
- § 1991. Wills. Execution. How proved. *Williams v. Moorhead*, 653.
- § 2106. Executors and administrators. Presentation of claim. Itemized account. *Duffey v. Kilroe*, 7.
- § 2110. Limitation of actions. Effect of administration. Claims. *Id.*
- § 2522. Bankruptcy. Transfer in violation of state law. Right of trustee. Husband and wife. Transfer between. Validity as against third persons. Right of trustee in bankruptcy. *McCabe v. Guido*, 858.
- § 2596. Insurance. Oral mortgage clause. *Hartford Ins. Co. v. Lumber Co.*, 822.
- § 2636. Mutual benefit insurance. Defense. Condition precedent. Statute. *E. H. of C. W. v. Wicker*, 211.
- § 2675. Insurance. Mutual benefit insurance. Defenses. Misstatements in application. *W. O. W. v. Farmer*, 626.
- § 2764. Wills. Construction. *Bibby v. Broome*, 70.
- § 2765. Perpetuities. Devise for more than two lives. Burden of Proof. *Id.*
- § 2765. Deeds. Estate tail. Conversion into fee simple. *Liberty Bank v. Wilson*, 337.

---

 COLLEGES AND UNIVERSITIES.
 

---

## CODE OF 1906—Continued.

- § 2772. Mortgages. Trust deeds. Foreclosure. Notice. Sufficiency. *Lake v. Castleman*, 175.
- §§ 2772, 2821-3984. Mortgages. Trust deeds. Foreclosure. Time of sale. *Shoe Co. v. Lynchburg*, 188.
- § 2776. Deeds. Construction. Estate created. Applications of rule in Shelley's case. *Liberty Bank v. Wilson*, 337
- § 2794. Mortgages. Deeds of trust. Assignment of debt. Recording. *West v. Union Naval Stores Co.*, 743.
- §§ 3072, 3074. Mechanics' liens. Notice. Priorities. *Lumber & Mfg. Co. v. Garber*, 229.
- § 3105. Limitation of actions. Effect of administration. Claims. *Duffey v. Kilroe*, 7.
- § 3108. Limitation of actions. Statute of limitations. Interruption by absence from state. *Hendricks v. Kellogg*, 22.
- § 3113. Limitation of actions. Effect of administration. Claims. *Duffey v. Kilroe*, 7.
- § 3444. Municipal corporations. Charters. Amendments. Recording. *Williams v. City of Vicksburg*, 79.
- § 3695. Witnesses. Privileged communications. Waiver by contract. *W. O. W. v. Farmer*, 625.
- § 3926. Process. Service of summons on absent defendant. Member of family. *Hendricks v. Kellogg*, 22.
- § 3997. Execution. Sale. Transcript from justice of peace. Filing. *Footte-Patrick Co. v. Merkle*, 720.
- § 4273. Taxation. Taxation by state. National banks. *Adams v. First Nat. Bank of Gulfport*, 450.
- § 4687. Judgment. Opening default judgment. Power of court. *U. S. Fid. & Guar. Co. v. State ex rel.*, 1.
- § 4750. Corporations. Foreign corporations. Power of state. *State ex rel. Collins v. Cotton Oil Co.*, 398.
- § 4842-4843. Carriers of passengers without tickets. Excessive fares. *Ill. Cent. R. Co. v. Miss. R. R. Co.*, 484.
- § 4056 (1908). Master and servant. Question for jury. Application of fellow servants' doctrine. *Lockman v. Alabama & V. Ry. Co.*, 772.
- § 1673. Divorce. Alimony. Necessity of valid marriage. *Aldridge v. Aldridge*, 385.

## COLLEGES AND UNIVERSITIES.

1. *Power to lease lands. Laws 1860, chapter 118, Section 1.*

The power granted to the trustees by chapter 118, Laws 1860, and again by section 745, Code 1880, to lease the lands of the University of Mississippi, is a continuing one, and therefore is not exhausted as to each parcel of land by one lease thereof. *State v. Hamilton*, 697.

---

 COMMERCE—CONDITIONAL SALES.
 

---

## COLLEGES AND UNIVERSITIES—Continued.

2. *Same.*

That a first lease had some time to run when a second was made has no bearing upon the power of the trustees to make the second lease. *State v. Hamilton*, 697.

## COMMERCE.

1. *Interstate commerce. Shipment between points in state.*

Where a bill of lading shows the routing to be outside of the state, though the points of origin and destination both be within the same state, under the decision of the United States supreme court, it is an interstate shipment, governed by the Carmack Amendment (Act June 29, 1906, ch. 3591, sec. 7, Pars. 11, 12, 34, Stat. 595; U. S. Comp. St. 1916, secs. 8604 A-8604AA.). *Ill. Cent. R. Co. v. Rogers & Hurdle*, 99.

2. *Carriers. Carmack amendment. Applicability.*

The Carmack Amendment applies although suit is not against the initial carrier, based on the bill of lading, but against the connecting carrier. *Ib.*

3. *Courts. Decisions of United States courts followed by state courts.*

Where a contract of shipment is an interstate one the provisions of the Carmack amendment governs the liability, in determining this liability the state courts are governed by the decisions of the United States supreme court. *Ib.*

4. *Interstate commerce. Employment agencies. Licenses.*

Laws 1912, chapter 94, requiring employment agencies hiring laborers to go out of the state, to pay a license fee of five hundred dollars in every county in which they operate, is neither a burden or tax on interstate commerce. *Garbutt v. State*, 424.

5. *Sales. Interstate transactions. Code 1906, section 935.*

Where the agent of an Alabama corporation purchased cotton seed "F. O. B. Como, Miss., mill weights to govern," for shipment to Alabama, where the mill was located and where the contract was required to be approved, it was not a Mississippi contract but an interstate transaction, and on failure to deliver the seed, the corporation could sue and recover for breach of contract in Mississippi although it had not filed its charter and paid the fee required under section 935, Code 1906. *Union Cotton Oil Co. v. Patterson*, 802.

## CONDITIONAL SALES.

• See SALES.

---

CONFUSION OF GOODS—CONSTITUTIONAL LAW.

---

## CONFUSION OF GOODS.

*Application of doctrine.*

In such case the doctrine of wrongful commingling of goods did not apply. *McCabe v. Guido*, 858.

## CONSIDERATION.

*See* RELEASE; SALES.

*See* BILLS AND NOTES.

## CONSTITUTION.

- § 24. Beneficial associations. Lodges. Forfeiture of charter. Presumptions. *Vicksburg Lodge v. G. L. of F. & A. M.*, 214.
- § 88. Banks and banking. Decreasing capital stock. *Perry v. Bank of Commerce*, 838.
- § 112. Levees. Privilege taxes. Power of legislature. *Tel. & Cable Co. v. Robertson*, 204.
- § 178. Corporations. Foreign corporations. Power of state. *State ex rel. Collins v. Cotton Oil Co.*, 398.
- § 234. Constitutional law. Validity of act. Burden of proof. *Tel. & Cable Co. v. Robertson*, 204.

## CONSTITUTIONAL LAW.

1. *Validity of act. Burden of proof.*

If the question of whether or not there was a publication of Laws 1902, chapter 80, with reference to the levy of privilege taxes by the levee commissioners, as required by Constitution 1890, section 234, is entertainable in the courts, it would require the party attacking the law to prove such fact by sufficient evidence. The burden of proof would be on the party alleging there was no publication to prove this fact beyond reasonable doubt or by clear and convincing testimony. *Tel. & Cable Co. v. Robertson*, 204.

2. *Passage of act. Compliance with constitution. Presumption.*

Where the legislature passes a bill, it will be presumed that it observed all constitutional requirements and did its full duty until the presumption is overcome by clear and convincing testimony. *Ib.*

3. *Levees. Privilege taxes. Power of legislature.*

It is too late now to question the power of the legislature to create taxing districts and confer on such taxing districts or municipal corporations, the power of taxation. Section 237 of the Constitution in dealing with this specific question confers full power upon the legislature to provide such system of taxation for said levee district as the legislature shall from time to time

---

CONSTITUTIONAL LAW.

---

## CONSTITUTIONAL LAW—Continued.

deem wise and proper. The legislature has full power to impose a privilege tax, or to authorize the levee commissioners to do so. *Tel. & Cable Co. v. Robertson*, 204.

4. *Same.*

The provisions of section 112 of the Constitution do not require the taxing body to levy privilege taxes according to the requirements of that section. *Ib.*

5. *Taxation. Uniformity. Privilege tax.*

The Constitution does not require that a municipal corporation, or taxing district, authorized by law to levy and collect privilege taxes require all privileges to be taxed that are authorized; nor that they shall be taxed in the same proportion to the maximum named in the statute, but so long as all persons exercising any particular privileges are taxed alike, under the same circumstances no constitutional principle is violated, *Ib.*

6. *Beneficial associations. Lodges. Forfeiture of charter. Presumptions.*

As under the laws of the land every person and corporation is entitled to resort to the courts, for redress of any grievance affecting reputation and property under section 24 of the Constitution of the state and as under section 25 of the Constitution no person can be debarred from prosecuting and defendant in any civil cause, and as under section 14 of the state Constitution, and the fourteenth amendment to the Federal Constitution no person can be deprived of life, liberty or property without due process of law, the court is bound to assume, in the absence of specific allegations and proof to the contrary that the grand lodge in forfeiting a charter of a subordinate lodge acted in accordance with its rules and proceeded from adequate cause. *Vicksburg Lodge v. G. L. of F. & A. M.*, 214.

7. *Right to contract. Fourteenth amendment.*

It is fundamental that the right to make contracts pertaining to business is one of the rights guaranteed by the law of the land, and especially the fourteenth amendment to the Constitution of the United States. *Jones v. Mississippi Farms Co.*, 295.

8. *Corporations. Foreign corporations. Power of state.*

The state not only has the right to prohibit a corporation from entering it for the purpose of transacting business but also to expel such a corporation from the state after it has entered and commenced doing business therein, provided only that such corporation is not thereby deprived of a right guaranteed to it by the federal Constitution. *State ex rel. Collins v. Cotton Oil Co.*, 398.

---

CONSTRUCTION OF INSTRUMENTS—CONTRACTS.

---

## CONSTITUTIONAL LAW—Continued.

9. *Same.*

The state also has the right, under section 178 of the state Constitution and within the limitations of section 14 thereof to withdraw from a domestic corporation powers granted to it when chartered, provided, also that such corporation is not thereby deprived of a right guaranteed to it by the federal Constitution. *Ib.*

10. *Same.*

Laws 1914, chapter 162 (Hemmingway's Code, section 4710 et Sequitur), providing that a corporation engaged in the manufacture of cotton seed oil products shall not operate a cotton gin except where its cotton oil plant is located, and imposing a penalty, and in addition forfeiture of charter, if a domestic corporation, and if a foreign corporation, forfeiture of its rights to do business in the state for violation of the statute, is within the powers of the state. *Ib.*

11. *Criterion.*

The criterion by which to test the constitutionality of a statute is not that those affected thereby may be inconvenienced. *Ib.*

12. *Injury obligation of contracts. Increasing liability of stockholders of banks.*

The legislature has the power to change the liability of stockholders with reference to future contracts, even against charter stipulations, where the power to amend or repeal was reserved when the charter was issued. *Pate v. Bank of Newton*, 666.

13. *Delegation of legislative power to chancery court.*

Laws 1912, chapter 195, as amended by Laws 1914, chapter 269, providing for the creation of drainage districts is not unconstitutional because it confers or imposes jurisdiction upon the chancery court in cases wherein the proposed district is to embrace territory situated in more than one county. *Wooten v. Hickahala Drainage District*, 787.

See BANKS AND BANKING; CORPORATIONS; LICENSES; TAXATION.

## CONSTRUCTION OF INSTRUMENTS.

See CONTRACTS; DEEDS; INSURANCE; WILLS.

## CONTRACTS.

1. *Carriers. Shipments of live stock. Notice of loss.*

Where under a contract for shipment of live stock, there was a provision requiring notice of claim for damages within one day

116 Miss.—59

---

CONTRACTS.

---

## CONTRACTS—Continued.

after delivery at destination, as a condition precedent to a right of recovery, such provision was sufficiently complied with, where before accepting the shipment of stock at destination, the shippers required the agent of the terminal carrier to note on the freight bill that "shipper received stock under condition stock in bad shape account overrun and lack feed and water. *Ill. Cent. R. Co. v. Rogers & Hurdle*, 99.

2. *Indemnity insurance. Requirement that insured prosecute.*

It is a reasonable contract where one party is insuring against acts constituting larceny or embezzlement to stipulate that the assured shall give information and institute prosecution, when required to do so, of all offenses on the part of the employee insured against. *Casualty Co. v. Oil & Fertilizer Co.*, 283.

3. *Damages. Provisions for liquidated damages.*

Under a contract for the sale of a railroad providing, that time was of the essence of the contract, that it was to be taken strictly and literally, that on the event of failure to make installment payment strictly and promptly, the contract should be null and void, the rights of the purchaser to cease at once *ipse facto*, that the property should revert and immediately reinvest in the seller, without any declaration of forfeiture or act of re-entry and without any other act, as fully and perfectly as if the contract had never been made, and that the moneys paid should be held absolutely as liquidated damages for the purchaser's breach. In such case the moneys paid under the contract by the purchaser before his refusal to continue were liquidated damages and not a penalty. *Jones v. Mississippi Farms Co.*, 295.

4. *Constitutional law. Right to contract. Fourteenth amendment.*

It is fundamental that the right to make contracts pertaining to business is one of the rights guaranteed by the law of the land, and especially the fourteenth amendment to the Constitution of the United States. *Ib.*

5. *Absence of modification. Enforcement.*

Unless the parties dealing with the subject-matter by their conduct modify or change the contract originally made, or so act in reference to it as to make it inconsistent for a party to claim or rely upon the contract contrary to its agreement and stipulations, it must be enforced as written. *Ib.*

6. *Damages. Liquidated damages or penalty.*

In construing a contract to determine whether a clause calls for liquidated damages or a penalty, the intention of the parties is the thing the court is anxious to ascertain and give effect to. *Ib.*

---

CONTRACTS.

---

## CONTRACTS—Continued.

7. *Same.*

The general rule is that the intention of the parties must be drawn from the words of the whole contract, and if viewing the language used, it is clear and explicit, then the court must give effect to the contract unless it contravenes public policy. If the language is doubtful, the court will look to the surroundings of the parties and to the construction placed upon the contract by the parties during its existence in order to learn the intention of the parties. *Ib.*

8. *Damages. Liquidated damages or penalty.*

In considering whether or not damages stipulated for as liquidated damages was intended by the parties really to be paid, if not disproportionate to the damages that might probably result from a violation of a contract, it will be held to be liquidated damages. If the contract is for the performance of a specific act for the nonperformance of which damages could easily be ascertained, then it may be treated as a penalty. *Ib.*

9. *Breach. Recovery by corporation not party.*

A corporation not a party to a contract cannot recover for its breach the damages it may have suffered therefrom; if it can recover anything, it is only as assignee of a party to the contract. *Ib.*

10. *Corporations. Exceeding charter powers. Recovery of damages.*

A foreign corporation which had no charter power to make a contract for the development of cut over timber lands cannot maintain a suit for damages for breach of a contract to purchase a railroad from it, ancillary to the development scheme, except as the damages are stipulated in the contract. *Ib.*

11. *Agreement. Implied agreements. Repairs.*

Before the owner of personal property can be held liable in debt for repairs done upon it, there must be some contract existing between the owner and the person making the repairs which contract may arise by agreement either express or implied, or by some act or agency of the parties creating an obligation between the parties concerning the matter involved. *Miller v. Fisher*, 350.

12. *Same.*

Where the owner of a motorboat, having allowed a third person to take possession of the boat and use it, the third person who was to keep the boat in repair, contracted in his own behalf with plaintiff for making repairs on the boat and the third person made part payment on the repairs and the owner who agreed



---

CONTRACTS.

---

## CONTRACTS—Continued.

to advance a sum of money for his benefit, sent plaintiff a check for a further amount. In such case, notwithstanding plaintiff's understanding that the boat was liable for the repairs, he could not, having in no way contracted for the repairs, or agreed to become liable therefor, hold the owner for such repairs. *Miller v. Fisher*, 350.

13. *Sales. Cancellation. Validity.*

Where the seller received the purchaser's telegram of confirmation of sale within the time stipulated, before the purchaser received the seller's telegram of cancellation, such attempted cancellation was void. *Telegraph Co. v. Hazlehurst O. M. & F. Co.*, 372.

14. *Carriers. Live stock. Filing claim of loss. Waiver of stipulations.*

The provision of a contract for the shipment of live stock, that the shipper shall file notice of loss within ten days of delivery is waived where the proper agent of the carrier received and accepted oral notice, acted upon it, and inspected the injured stock shortly after their arrival, and made notation upon the way bill of the injuries and damages to the stock at the time. *Bernstein v. Yazoo & M. V. R. R. Co.*, 382.

15. *Telegraphs and telephones. Stipulations as to liability. Effect.*

In such case the amount of recovery will not be limited by the amount paid for the transmission of the telegram although there was a stipulation to that effect on the back of the message. *Lumber Co. v. Telegraph Co.*, 660.

16. *Intent. Body of agreement. Signature.*

Where the body of an agreement shows a personal guaranty by the writer, though he signs the agreement as the agent of another, in such case the body of the agreement controls and not the signature, and the agreement will be held to be the personal guaranty of the agent and not of his principal. *Guar. & Acc. Co. v. Lumber Co.*, 534.

17. *Attorney and client. Compensation. Compromise.*

Where the board of supervisors of a county contracted to pay attorney's compensation only in the event that they successfully relisted the payment of certain warrants and the circuit court in which the suit was brought to collect such warrants decided adversely to the county, and the board of supervisors of the county, over the objections of the attorneys who had taken an appeal, compromised the case. In such case the attorneys were not entitled to compensation, since the litigation did not termi-

---

 CONTRIBUTORY NEGLIGENCE—CORPORATIONS.
 

---

## CONTRACTS—Continued.

nate successfully for the county according to the terms of the contract with the attorneys. *Lamar Co. v. Tally & Mayson*, 588.

18. *Counties. Contracts. Validity.*

A county must act by order entered upon the minutes of its board of supervisors, in reference to its contracts, and where a contract is made it can only be varied by an order entered upon the minutes of the board. *Ib.*

19. *Insurance. Renewal contracts. Presumptions.*

Where an authorized agent of an insurance company orally agreed to renew a policy, but nothing was said about any change in its terms or the amount of the premium the terms of the new policy will be presumed to be the same as those in the old policy. *L. & L. & G. Ins. Co. v. Hinton*, 754.

20. *Insurance. Renewal. Terms.*

Where there had been a change in the partners of an insurance agency, since the issuance of an original policy—but the agent who actually wrote the policy continued as a member of the firm in such case the insurance agency was fully advised as to the old policy when it agreed to a renewal thereof and such renewal policy in the absence of agreement to the contrary will be without change of conditions and upon the same terms as the original policy. *Ib.*

21. *Insurance. Oral mortgage clause. Code 1906, section 2596.*

No additional consideration is required to be paid as a condition for the insertion of a mortgage clause the consideration paid by the original insurer constitutes a sufficient and valuable consideration for the contract between the insurance company and the mortgagee, since it imposes no increased hazard. *Hartford Ins. Co. v. Lumber Co.*, 822.

*See INSURANCE.*

## CONTRIBUTORY NEGLIGENCE.

*See NEGLIGENCE.*

## CONVERSION.

*See RAILROADS.*

## CORPORATIONS.

1. *Beneficial associations. Lodges. Power of subordinate lodge.*

A local lodge of the Grand Masonic Lodge which had become incorporated by the statute of the state empowering it to acquire and hold property, and giving it perpetual succession,

---

CORPORATIONS.

---

## CORPORATIONS—Continued.

cannot be deprived of its property by a revocation of its lodge charter by the Grand Lodge, which is without power to destroy a local lodge as a corporation of the state. *Vicksburg Lodge v. G. L. of F. & A. M.*, 214.

2. *Contracts. Breach. Recovery by corporation not party.*

A corporation not a party to a contract cannot recover for its breach the damages it may have suffered therefrom; if it can recover anything, it is only as assignee of a party to the contract. *Jones v. Mississippi Farms Co.*, 295.

3. *Exceeding charter powers. Recovery of damages.*

A foreign corporation which had no charter power to make a contract for the development of cut over timber lands cannot maintain a suit for damages for breach of a contract to purchase a railroad from it, ancillary to the development scheme, except as the damages are stipulated in the contract. *Ib.*

4. *Foreign corporations. Power of state.*

The state not only has the right to prohibit a corporation from entering it for the purpose of transacting business but also to expel such a corporation from the state after it has entered and commenced doing business therein, provided only that such corporation is not thereby deprived of a right guaranteed to it by the federal Constitution. *State ex rel. Collins v. Cotton Oil Co.*, 398.

5. *Same.*

The state also has the right, under section 178 of the state Constitution and within the limitations of section 14 thereof to withdraw from a domestic corporation powers granted to it when chartered, provided, also that such corporation is not thereby deprived of a right guaranteed to it by the federal Constitution. *Ib.*

6. *Same.*

Laws 1914, chapter 162 (Hemmingway's Code, section 4750 et sequitur), providing that a corporation engaged in the manufacture of cotton seed oil products shall not operate a cotton gin except where its cotton oil plant is located, and imposing a penalty, and in addition forfeiture of charter, if a domestic corporation, and if a foreign corporation, forfeiture of its rights to do business in the state for violation of the statute, is within the powers of the state. *Ib.*

7. *Banks and banking. Stockholders. Double liability. Time to sue.*

Under Laws 1914, chapter 124, section 59, imposing a double lia-

---

CORPORATIONS.

---

## CORPORATIONS—Continued.

bility upon the stockholders of a bank, the obligation of such stockholders is a primary and not a secondary liability and a suit against them may be maintained whenever it is reasonably apparent that the assets of the bank will not pay the depositors and there is no requirement to await a collection and application of the debts and property of the bank before bringing such suit against the stockholders. *Pate v. Bank of Newton*, 666.

8. *Banks and banking. Increasing liabilities of stockholders. Constitutionality.*

Where a bank was chartered under the general laws of the state at a time when the Constitution expressly provided that all such charters could be repealed or amended by the legislature whenever in the judgment of the legislature it was for the public interest to do so, provided no injustice be done to the stockholders, no injustice was done such bank by Laws 1914, chapter 124, section 59, which while increasing the liability of a stockholder of the bank to the extent of the par value of his stock, at the same time guaranteed payment of depositors by the state. *Ib.*

9. *Same.*

The legislature may impose reasonable conditions upon the rights of either individuals or corporations as to their future contracts. *Ib.*

10. *Constitutional law. Injury obligation of contracts. Increasing liability of stockholders of banks.*

The legislature has the power to change the liability of stockholders with reference to future contracts, even against charter stipulations, where the power to amend or repeal was reserved When the charter was issued. *Ib.*

11. *Assignments of deed of trust. Seal.*

In equity the failure to place the corporate seal on an assignment of a deed of trust by a corporation will not affect the title in the assignee. *West v. Union Naval Stores Co.*, 743.

12. *Assignment of secured debt. Seal.*

The assignment, by a corporation, of a debt secured by a deed of trust, is not required to be made under seal. *Ib.*

13. *Commerce. Sales. Interstate transactions. Code 1906, section 935.*

Where the agent of an Alabama corporation purchased cotton seed "F. O. B. Como, Miss., mill weights to govern," for shipment to

---

 COUNTIES.
 

---

## CORPORATIONS—Continued.

Alabama, where the mill was located and where the contract was required to be approved, it was not a Mississippi contract but an interstate transaction, and on failure to deliver the seed, the corporation could sue and recover for breach of contract in Mississippi although it had not filed its charter and paid the fee required under section 935, Code 1906. *Union Cotton Oil Co. v. Patterson*, 802.

14. *Banks and banking. Decreasing capital stock.*

Under Constitution 1890, section 88, the right is given to the legislature to create corporations and amend or change charters of corporations, and where the charter of the corporation itself provides that it may be amended by reading into it section 899, Code 1906 (Hemmingway's Code, section 4071), permitting amendments, and the corporation so provides by its by-laws, as authorized under section 901, Code 1906 (Hemmingway's Code, section 4073), and where the majority of the stockholders pass a resolution for the amendment, properly petition for the same under the law, and the amendment is granted as authorized by the statute. Such amendment is legal and valid. *Berry v. Bank of Commerce*, 838.

15. *Banks and banking. Decreasing capital stock. Injustice to stockholder.*

An amendment to the charter of a bank reducing its capital stock from thirty-five thousand dollars to twenty-five thousand dollars does no injustice to a stockholder, where he is offered now stock under the amended charter which is of the same actual value, though a less number of shares, as the stock held by him in the bank before its capital stock was reduced by the amendment. *Ib.*

See BANKS AND BANKING; FRAUD; PLEADING.

## COUNTIES.

1. *Sale of road bonds. Obligation of buyer. Payment.*

It is the duty and obligation of bond buyers to pay for bonds in actual money, in the absence of an express statute authorizing the taking of something other than money in payment of bonds, but where a check is accepted in payment and actually paid into the proper depository of the county, it will be treated as payment. *U. S. Fidelity Co. v. First State Bank*, 239.

2. *Sale of road bonds. Payment by notes.*

A county depository was not authorized to take as payment for road bonds the individual notes of its officers, held by the purchaser. *Ib.*

---

COUNTIES.

---

## COUNTIES—Continued.

3. *Sale of road bonds. Payment by checks.*

Where a state bank, being a county depository, received a bond issue of a road district of the county, for delivery to a purchaser, and received a check from the purchaser as an advance payment and the check was afterwards paid, this constituted a payment on the bond purchase. *Ib.*

4. *Actions by or against counties. Persons entitled to control.*

Since a county may sue through either the board of supervisors, the district attorney, the state revenue agent, or the attorney-general, the officer first instituting suit has the exclusive control thereof, if he acts in good faith and where the state revenue agent sued on behalf of the county, he represented the county in all phases of the litigation, and, though not charged with the duty of defending suits against the county, was bound to conduct the litigation on behalf of the county as to any offset or counterclaim properly entertainable, unless the court authorized some other officer to appear and file appropriate pleadings necessary for the protection of the interest of the county. *Robertson v. Bank of Batesville*, 502.

5. *Actions by or against counties. Persons entitled to control.*

In a suit by the revenue agent on behalf of the county against a county depository, which interposes a cross-bill, if the court thinks that the county's interest would be better conserved by permitting the attorneys for the board of supervisors to co-operate with the revenue agent, it may permit them to do so, but this authority must be exercised charily. *Ib.*

6. *Contracts. Validity.*

A county must act by order entered upon the minutes of its board of supervisors, in reference to its contracts, and where a contract is made it can only be varied by an order entered upon the minutes of the board. *Lamar Co. v. Tally & Mayson*, 588.

7. *Contracts. Board of supervisors.*

The board of supervisors being trustees of the public cannot divest itself of the right to control litigation against the county. *Ib.*

8. *Animals. Tick eradication. Death of animals. Liability. Laws 1914, chapter 222. Construction.*

Laws 1914, chapter 222, providing for the dipping of cattle to eradicate ticks, and authorizing the board of supervisors on satisfactory proof to pay for damages suffered by the owner of the cattle in the process of dipping, is not a statute creating an absolute liability against the county, but is an enabling statute to authorize the board to pay such claims in any amount

---

COURTS—DAMAGES.

---

## COUNTIES—Continued.

they may consider to be proper for such injury within the limits prescribed by the statute and when the board of supervisors disallow such claims the owner cannot recover from the county. *Horton v. Lincoln Co.*, 813.

## COURTS.

*Decisions of the United States courts followed by state courts.*

Where a contract of shipment is an interstate one the provisions of the Carmack amendment governs the liability, in determining this liability the state court are governed by the decisions of the United States supreme court. *Ill. Cent. R. Co. v. Rogers & Hurdle*, 99.

## DAMAGES.

1. *Provisions for liquidated damages.*

Under a contract for the sale of a railroad providing, that time was of the essence of the contract, that it was to be taken strictly and literally, that on the event of failure to make installment payment strictly and promptly, the contract should be null and void, the rights of the purchaser to cease at once *ipso facto*, that the property should revert and immediately reinvest in the seller, without any declaration of forfeiture or act of re-entry and without any other act, as fully and perfectly as if the contract had never been made, and that the moneys paid should be held absolutely as liquidated damages for the purchaser's breach. In such case the moneys paid under the contract by the purchaser before his refusal to continue were liquidated damages and not a penalty. *Jones v. Mississippi Farms Co.*, 295.

2. *Liquidated damages or penalty.*

In construing a contract to determine whether a clause calls for liquidated damages or a penalty, the intention of the parties is the thing the court is anxious to ascertain and give effect to. *Ib.*

3. *Liquidated damages or penalty.*

In considering whether or not damages stipulated for as liquidated damages was intended by the parties really to be paid, if not disproportionate to the damages that might probably result from a violation of a contract, it will be held to be liquidated damages. If the contract is for the performance of a specific act for the nonperformance of which damages could easily be ascertained, then it may be treated as a penalty. *Ib.*

---

 DEATH.
 

---

## DAMAGES—Continued.

4. *Death. Damages. Adequacy.*

In a suit by a son for the death of his father, an award of fifty dollars was grossly inadequate, where there was no question as to the right of the son of deceased who was entitled to recover one-half of the damages on account of deceased's suffering before death, together with one-half of the value of his expectancy, such amounts being subject only to deductions on account of deceased's contributory negligence. *Huff v. Bear Creek Mill Co.*, 509.

5. *Duty to reduce damages. Landlord's ten.*

A landlord cannot pay to his tenant who is indebted to him sums of money in excess of the amount due by the tenant, and thereafter recover the amount due by the tenant from a purchaser of products of the tenant in good faith. *Scott & Garrett v. Green River Lumber Co.*, 524.

See TELEGRAPHS AND TELEPHONES.

## DEATH.

1. *Damages. Adequacy.*

In a suit by a son for the death of his father, an award of fifty dollars was grossly inadequate, where there was no question as to the right of the son of deceased who was entitled to recover one-half of the damages on account of deceased's suffering before death, together with one-half of the value of his expectancy, such amounts being subject only to deductions on account of deceased's contributory negligence. *Huff v. Bear Creek Mill Co.*, 509.

2. *By wrongful act. Recovery at common law.*

By the common law there could be no recovery of damages for the death of a human being. *Kirkpatrick v. Ferguson-Palmer Co.*, 874.

3. *Loss of services of child. Measure of damages.*

Even though the wrongful employment of a minor without the consent of his mother be an actionable wrong, the measure of damages under the common law would be no greater than would be the measure of damages if defendant were guilty of the wrongful or negligent killing of the boy. In other words without our statute, recovery would be limited to services lost during the minority and prior to the death of the child. *Id.*

4. *By wrongful act. Negligence. Statute.*

Chapter 214, Laws 1914, simply re-enacts or brings forward in amended form section 721, Code 1906, the only statute giving



---

DEEDS—DEPOSITIONS.

---

## DEATH—Continued.

the right of recovery for injuries producing death. The essential nature of the recovery under the statute in its present amended form is the same under the Code of 1906. The true test of any right to recover under the statute is whether the deceased could have maintained an action had death not resulted so that if the servant would have no action against his master his next of kin could not sue under the statute. *Kirkpatrick v. Ferguson-Palmer Co.*, 874.

## DEEDS.

1. *Construction. Estate created. Applications of rule in Shelley's Case. Code 1906, section 2776.*

Neither the rule in Shelley's Case nor section 2776, Code 1906, abolishing it have any application where the grant to the grantee is not "for life with remainder to the heirs of her body," but to her and the heirs of her body. *Liberty Bank v. Wilson*, 377.

2. *Estate tail. Conversion into fee simple.*

At common law a grant to A and the heirs of his body conveyed a fee conditional; under the statute *de bonis conditionalibus* it conveyed a fee tail, but under section 2765, Code 1906, Hemmingsway's Code, section 2269, it conveys a fee simple. *Id.*

3. *Corporations. Assignments of deed of trust. Seal.*

In equity the failure to place the corporate seal on an assignment of a deed of trust by a corporation will not affect the title in the assignee. *West v. Union Naval Stores Co.*, 743.

*See* CORPORATIONS.

## DEFAULT.

*See* JUDGMENT.

## DEPOSITIONS.

*Failure to answer questions. Effect.*

Where a deposition was taken on notice, but not under the statute, it could not be treated as answers to questions propounded under the statute, but should be treated as an ordinary deposition, and if the answer was not specific it should be suppressed, but judgment should not be rendered as under the statute for the adverse party especially where the witness replied with reasonable fullness by referring to testimony taken in another deposition. *Weil Bros. v. Wittjen*, 514.

---

DEPOSITORIES—DIVORCE.

---

## DEPOSITORIES.

1. *Effect of deposits. Ownership of funds.*

Funds paid by a county into a depository duly contracted with, are not funds of the county, and not trust funds, but become the funds of the depository bank. *Robertson v. Bank of Batesville*, 501.

2. *Actions against depositories. Cross-bills.*

Where the proceeds of a bond issue for the construction of bridges and roads, and the amount of *ad valorem* and commutation taxes were paid into one common fund under the direction of the county auditor, and warrants were paid by the county depository without keeping the accounts of the two funds separate, and the state revenue agent sued the depository for an accounting and a restoration of the road bond fund, a cross-bill by the depository, asking that, if it should be held that it was not authorized to pay certain warrants from the proceeds of the bonds, it might be subrogated to the rights of the holders of such warrants and be allowed to collect the amount so paid from the road tax fund, was maintainable. *Ib.*

3. *Actions against. Doing equity.*

Where the revenue agent comes into equity and seeks equitable relief, he must be required to do equity, and the chancery court, in dealing with the matter, where the funds are commingled, will apply the funds as they ought to have been applied, applying to the bond funds such warrants as should properly have been paid from this fund, and allowing the depository to be subrogated to the rights of holders and to have funds paid in as *ad valorem* and road commutation funds applied to warrants which would have been paid out of such funds had the accounts been properly kept separate. If there should be any shortage in the road bond fund after so applying the warrants, then the judgment should be rendered to the amount of such funds so improperly paid out, and the revenue agent's commission should be limited to such amount as may be due by the depository after properly applying the warrants to the appropriate fund. *Ib.*

*See EQUITY.*

## DIVORCE.

1. *Alimony. Necessity of valid marriage.*

There is no foundation for alimony on the granting of a divorce, where each of the parties to a purported marriage had been married previously and not divorced and both of the former spouses

---

DRAINAGE DISTRICTS—EQUITY.

---

## DIVORCE—Continued.

were living, since in such case the last marriage was void. *Aldridge v. Aldridge*, 385.

2. *Alimony. Necessity of valid marriage. Code 1906, section 1673. Hemingway's Code, section 1415.*

Under Code 1906, section 1673, Hemmingways Code, section 1415, providing that, when a divorce shall be decreed, the court may, in its discretion, as may seem equitable and just, make all orders touching the maintenance and alimony of the wife, it would not be equitable and just to award alimony on the granting of a divorce to a woman who was not legally married to the defendant, but who to all intents and purposes, was simply his mistress, although she had aided him in the accumulation of what property he had. *Ib.*

*See* MARRIAGE.

## DRAINAGE DISTRICTS.

*See* DRAINS.

## DRAINS.

1. *Formation of drainage districts. Notice to landowner. Statute.*

Laws 1912, chapter 195, as amended by Laws 1914, chapter 269, providing for the organization of drainage districts do not contemplate that the published notice to the owners of the land shall be directed to each owner by name. The proceedings prescribed were and are *in rem* and are of such a nature as would arrest the attention of all interested persons and any other method would be impracticable. *Wooten v. Hickahala Drainage District*, 787.

2. *Constitutional law. Delegation of legislative power to chancery court.*

Laws 1912, chapter 195, as amended by Laws 1914, chapter 269, providing for the creation of drainage districts is not unconstitutional because it confers or imposes jurisdiction upon the chancery court in cases wherein the proposed district is to embrace territory situated in more than one county. *Ib.*

## EQUITY.

1. *Beneficial associations. Unconscionable rules.*

Equity will not lend its aid in enforcing a forfeiture of the charter of a local lodge for some contumacy or misconduct of a subordinate lodge. *Vicksburg Lodge v. G. L. of F. & A. M.*, 214.

---

EQUITY.

---

## EQUITY—Continued.

2. *Specific performance. Contract requiring superintendence of court.*

Equity will not direct a specific performance of a contract where it would require constant superintendence of the court from day to day for an indefinite time in order to enforce the carrying out of its decrees. *Jones v. Mississippi Farms Co.*, 295.

3. *Depositories. Actions against. Doing equity.*

Where the revenue agent comes into equity and seeks equitable relief, he must be required to do equity, and the chancery court, in dealing with the matter, where the funds are commingled, will apply the funds as they ought to have been applied, applying to the bond funds such warrants as should properly have been paid from this fund, and allowing the depository to be subrogated to the rights of holders and to have funds paid in as *ad valorem* and road commutation funds applied to warrants which would have been paid out of such funds had the accounts been properly kept separate. If there should be any shortage in the road bond fund after so applying the warrants, then the judgment should be rendered to the amount of such funds so improperly paid out, and the revenue agent's commission should be limited to such amount as may be due by the depository after properly applying the warrants to the appropriate fund. *Robertson v. Bank of Batesville*, 501.

4. *Insurance. Removal contracts. Presumptions.*

A court of equity will compel the issuance and delivery of an insurance policy after loss, where there has been a valid agreement for one before the loss and will enforce its payment as if made in advance and this will be done though the contract was by parol. *L. & L. & G. Ins. Co. v. Hinton*, 754.

5. *Bankruptcy. Suits by trustee. Nature and form of remedy.*

Under section 533, Code 1906, giving the chancery courts jurisdiction of suits by creditors to set aside fraudulent conveyances, where a wife owning a store as her separate property verbally exchanged it for a store owned by her husband, and the husband purchased a new stock of goods for the stock taken by him, which had been commingled with that on hand in the store of the wife at the time the invalid transfer was made. In such case the wife's trustee in bankruptcy could sue in chancery to recover the property transferred, and still remaining in the hands of the husband, since only a court of chancery could adequately protect the rights of both husband and wife and the creditors of each. *McCabe v. Guido*, 858.

---

 ESTATE—EVIDENCE.
 

---

## ESTATES.

1. *Deeds. Construction. Estate created. Applications of rule in Shelley's Case. Code 1906, section 2776.*

Neither the rule in Shelley's Case nor section 2776, Code 1906, abolishing it have any application where the grant to the grantee is not "for life with remainder to the heirs of her body," but to her and the heirs of her body. *Liberty Bank v. Wilson*, 377.

2. *Deeds. Estate tail. Conversion into fee simple.*

At common law a grant to A and the heirs of his body conveyed a fee conditional; under the statute *de bonis conditionalibus* it conveyed a fee tail, but under section 2765, Code 1906, Hemmingway's Code, section 2269, it conveys a fee simple. *Ib.*

See WILLS.

## ESTATES TAIL.

See ESTATES.

## ESTOPPEL.

1. *Deeds. Rights of parties. Fraudulent representations.*

Where parties in ignorance of the real facts are induced by misrepresentations to execute a deed to their lands, they are not thereby estopped from asserting their rights to the lands or from recovering the value thereof except as to *bona-fide* purchaser, for value without notice. *Carmichael v. Parks*, 710.

2. *Banks and banking. National banks. Ultra vires contracts.*

A national bank cannot be held liable for acts in excess of its charter powers and such bank is not estopped to plead *ultra vires* in defense of any unlawful contract. *U. S. Fidelity Co. v. First State Bank*, 239.

3. *Insurance. Validity of policy. Estoppel.*

Where the general agent of the defendant insurance company, who had authority to do so, stated that a fire policy was effective as to plaintiff's interest, and that he would make out the necessary mortgage clause, he thereby waived the actual writing of the mortgage clause and in such case the insurance company was estopped to make any of these contentions. *Hartford Ins. Co. v. Lumber Co.*, 822.

## EVIDENCE.

1. *Admission. Stipulations as to liability of shippers.*

The signing by shippers of a bill of lading stating that they have had the option of shipping at carriers' risk at a higher rate, but have elected to make a contract stipulating that suit must be

---

EVIDENCE.

---

## EVIDENCE—Continued.

brought within six months and accept the lower rate, is an admission that they were offered by the initial carrier, two separate contracts, and that they chose the one containing the stipulation in consideration of the reduced rate. *Ill. Cent. R. Co. v. Rogers & Hurdle*, 99.

2. *Carriers. Stipulations as to liability. Burden of proof.*

In such case, before the shippers can avoid the stipulations in the contract the burden of proof is upon them to show that they were not offered the choice of rates referred to in such contract, the recitals in the contract being *prima-facie* evidence of the fact that this choice was offered the shippers. *Ib.*

3. *Admissions in bill of lading.*

Testimony that the shippers accepted and signed the conditional bill of lading without reading it is not sufficient to contradict written admissions contained therein that the shippers were offered choice of rates depending on the liability of the carrier. *Ib.*

4. *Carriers. Passengers. Statutory presumptions. "Running." Code 1906, section 1985, Laws 1912, chapter 215.*

Under Code 1906, section 1985, as amended by Laws 1912, chapter 215, providing that in all actions against railroad corporations and all other corporations, companies, partnerships, and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline, or lever power and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, etc., shall be *prima-facie* evidence of the want of reasonable skill and care, and that the section shall apply to passengers and employees of railroad corporations and other such corporations, etc. The word "running" is not to be literally applied, for otherwise the statute might be given an absurd construction but "run" should be treated as equivalent to the word "operate" and hence the section applies to a passenger on an interurban electric car who was standing on the back platform while the car was stationary awaiting a clear track and was injured by a shock received from the controller of the car upon which he was standing. *G. & M. Coast Traction Co. v. Hicks*, 164.

5. *Documentary evidence. Certified copies. Admissibility.*

Under sections 1956 and 1974, Code 1906, providing that the record of any writing permitted to be recorded, or a copy thereof, when certified by the clerk, shall be received in evidence without accounting for the original, but if the execution be disputed,

---

EVIDENCE.

---

## EVIDENCE—Continued.

the original shall be produced, or its absence accounted for, before the certified copy shall be received in evidence, and that in suits founded on any written instrument it shall not be necessary to prove the signature or execution thereof, unless the same be specifically denied by verified pleas, where complainants denied under oath the execution of the deed under which defendant claimed it was improper to admit over complainant's objection a certified copy in evidence without any foundation therefor being laid. *Currie v. Ulmer*, 187.

6. *Constitutional law. Passage of act. Compliance with constitution. Presumption.*

Where the legislature passes a bill, it will be presumed that it observed all constitutional requirements and did its full duty until the presumption is overcome by clear and convincing testimony. *Tel. & Cable Co. v. Robertson*, 204.

7. *Insurance. Actions. Question for jury. Peremptory instruction.*

In such case it was improper for the court to exclude testimony offered by the employer showing that he had not embezzled or stolen any of his employer's money or property. *Casualty Co. v. Oil & Fertilizer Co.*, 283.

8. *Banks and banking. Actions against banks. Opinion.*

Where the bank with which a partnership engaged in the sawmill business did their banking business credited the partnership with only eighty per cent. of the amount of sale of lumber, retaining twenty per cent. of the price until the purchaser had finally settled for the lumber, and one of the partners brought suit for an accounting, his testimony that he had looked at the books of the bank and tried to ascertain as best he could what amount if any was due the partnership on the twenty per cent. retained and that according to his best judgment, he thought it was about six hundred dollars, such evidence was his opinion rather than a statement of fact, and was too vague and indefinite to support a decree in his favor, especially where officers of the bank testified and explained according to the books that the partnership had been credited fully with the amount retained. *Hebron Bank v. Gambrell*, 343.

9. *Marriage. Presumptions. Divorce from former wife.*

A marriage duly proved will be presumed valid, although a former wife of the man may be still living and there be no evidence of a divorce from her, the burden of proof to show the negative fact that there was no divorce being on the party who denies the validity of the second marriage. *Aldridge v. Aldridge*, 385.

---

EVIDENCE.

---

## EVIDENCE—Continued.

10. *Judicial notice. Railroad ownership.*

Courts cannot take judicial notice of the ownership of railroads because such ownership has been proven in another and different case. *Illinois Cent. R. Co. v. Walker*, 432.

11. *Carriers. Live stock. Loss in transit. Burden of proof. Code 1906, sec. 1974.*

Code 1906, section 1974, providing that proof of signature of written instruments shall be unnecessary unless denied under oath, is inapplicable where an interstate live stock shipper alleged in his declaration the execution of a contract with the defendant, a connecting carrier, which failed to deny such allegation, and this section did not remove the burden of proof of the execution of such contract from the shipper where the bill of lading on its face was made alone by the initial carrier. *Id.*

12. *Witness. Privileged communications. Physicians.*

The testimony of a physician who attended plaintiff after his injury was properly excluded on plaintiff's objection. *Newton Oil Mill v. Spencer*, 568.

13. *Book of account. Cash items.*

Where there was a custom between a merchant doing a large business and employing clerks and a bookkeeper and keeping the usual elaborate set of books and B, who had a number of hands or employees working for him, whereby the merchant advanced supplies and items of cash from time to time to B and his employees and charged the cash items to B's account in the same way that the goods were charged, and his bookkeeper would make out a statement of the account monthly and submit it to B for his information and approval, and the integrity of the books and correctness of the itemized account was vouched for by the bookkeeper and his assistant, and there was nothing to indicate any irregularity in the method of keeping the books or any suspicion of improper dealing appearing on their face. In such case the books were admissible on the trial of a claim against the estate of B to prove the items of cash charged on the account as well as the items of goods, especially where the bookkeeper had personal knowledge of many of the items and was quite positive about the correctness of all the cash items. *Barnes v. Rule*, 600.

14. *Trial. Objections to evidence. Good in part.*

Where in an action on a benefit certificate with which no copy of the application was delivered, defendant could not deny the truth of the statements contained in the application, but plaintiff had waived the privilege provided by Code 1906, section 3695,



---

EVIDENCE.

---

## EVIDENCE—Continued.

in regard to communications made to his physician. In such case, the evidence of the physician must be confined to facts tending to prove the insured's state of health after his application for the certificate was made, he could not be permitted to testify as to matters accruing prior thereto. *W. O. W. v. Farmer*, 626.

15. *Same.*

Where objection was made to all of the testimony of a witness a part of which was competent and a part incompetent, without limiting the objection to the incompetent part, the objection should have been overruled. *Ib.*

16. *Sales. Actions. Liability.*

In a suit for the price of feedstuff, the mere fact that a letter from the defendant to plaintiff acknowledged the indebtedness sued for and promised to pay same, was not conclusive against the defendant, under the facts herein, for the reason that if there was no liability on the part of defendants before the letter was written, there could be none afterwards, because of no consideration. *Brooks & Myers v. Grocery Co.*, 646.

17. *Same.*

While such a letter was competent evidence, to be considered by the jury, tending to show that defendants did purchase of, receive from, and were indebted to plaintiff in the amount sued for, yet it would not be conclusive as against the testimony of the defendants that they did not purchase or receive the bill of feedstuff from plaintiff and were not indebted to plaintiff for it. *Ib.*

18. *Wills. Execution. How proved. Code 1906, section 1991.*

Under Code 1906, section 1991 (Hemmingway's Code, section 1656), providing that the due execution of a will must be proved by at least one of the subscribing witnesses when present in person, where such attesting witness cannot be procured, or refuses to testify or denies the execution of the will, such execution may be established by other proof. *Williams v. Moorhead*, 653.

19. *Tax deed. Correction of description by extrinsic evidence.*

Where the tax assessment described land sold for delinquent taxes as "Mrs. N. M. Fairley, fifty feet on east half of lots 7 to 12, block 100, section 4, township 8, range 11, City of Gulfport," and the tax deed described the land as "One lot fifty feet on east half of lots 7 to 12," etc., lots 7 to 12 being one hundred and sixty feet long, running east and west. Therefore the description "East half of lot 7 to 12" would certainly designate the east eighty feet of these lots. The tax deed calls for fifty feet

---

EXECUTORS AND ADMINISTRATORS.

---

## EVIDENCE—Continued.

on this eighty foot tract. Whether this fifty feet be intended on the east or west end of this eighty-foot tract, the tax deed on its face does not disclose, but the assessment and tax deed furnish the clue which, when followed by the aid of other testimony, conducts certainly to the land intended, and in such case oral testimony and documentary proof may be introduced for this purpose. *Albriton v. Fairley*, 705.

20. *Wills. Execution. Secondary evidence. Probate.*

When a will is presented for probate, secondary evidence cannot be used to establish its due execution, if any of the subscribing witnesses will and can prove the facts until they have been called or produced. *Helm v. Skeek*, 726.

21. *Admissibility. Telephone conversations.*

In a suit to compel the issuance of a renewal policy in accordance with the terms of an alleged oral contract, the evidence of witnesses who heard what plaintiff said in a telephone conversation in regard to such renewal was competent. *L. & L. & G. Ins. Co. v. Hinton*, 754.

22. *Insurance. Renewals. Materiality.*

Where one of the partners in an insurance agency knew of and acquiesced in a renewal by an employee of a fire policy, it was not material what conversations took place during the fire or afterwards, when plaintiff and defendant were looking for the insurance policy. *Id.*

See CARRIERS; INSURANCE.

---

EXECUTORS AND ADMINISTRATORS.

---

1. *Presentation of claim. Itemized account.*

Under Code 1906, section 2106, requiring an itemized account in probating a claim against the estate of a decedent, it is not necessary that a doctor's claim for visits to decedents should show the days of the month of such visits but where the visits are grouped on the account by months, the due date of each item will be held to be the first day of the month in which it is charged, in applying the statute of limitations. *Duffey v. Kilroe*, 7.

2. *Limitation of actions. Effect of administration. Claims.*

Under Code 1906, section 3113, so providing, a debt not barred by limitation at the death of the debtor remains alive in any event for at least one year after the death of the debtor. *Id.*

---

EXECUTION.

---

## EXECUTORS AND ADMINISTRATORS—Continued.

3. *Limitation of actions. Effect of administration. Claims.*

Under Code 1906, section 2110, so providing the proper probaton and registering of claims against the estate of a decedent, stops the general statute of limitations against it. *Duffey v. Kilroe*, 7.

4. *Limitation of actions. Effect of administration. Claims.*

Code 1906, section 3105, providing that action may not be brought against an executor or administrator on a judgment or other cause of action against deceased, but within four years after the qualification of an executor or administrator is the only statute of limitations applicable after a claim not then barred by a general statute has been registered and probated. *Id.*

5. *Disputed claims. Review. Questions of fact.*

Where, on the trial of a contest by the administrator of a claim against the estate of his decedent, the books of the claimant were introduced and their correctness duly attested by the book-keeper, who in addition testified positively as to paying out all the items of cash charged on the account against the decedent either to the decedent himself or at his request, to his employees, in such case the credibility and weight of this testimony was a matter for the determination of the auditor and the chancellor, who gave full hearing to the auditor's report. *Barner v. Rule*, 600.

6. *Appointment and removal. Discretion.*

Where a party claiming to be the widow of deceased had been appointed administratrix of his estate, and afterwards another party claiming to be his only true and lawful widow petitioned for the removal of the first party and the appointment of herself as administratrix, it was proper for the court, in its discretion pending the settlement between the rival claimants, to remove the administratrix first appointed and appoint a third party administrator of the estate. *Shrader v. Johnson*, 467.

See INSURANCE.

## EXECUTION.

1. *Sale. Transcript from justice of peace. Filing. Code 1906, section. 3997.*

Code 1906, section 3997 (Hemmingway's Code, Section 3304), providing that the title to land sold under execution issued by a justice of the peace shall not be complete in the purchaser until he shall have obtained from the justice a certified transcript of the proceedings had before him in the suit, etc., which shall be

---

FRAUD

---

## EXECUTION—Continued.

filed with the conveyance made by the officer in the chancery clerk's office, and recorded with the conveyance, applies where the execution was issued by the circuit clerk upon an enrolled judgment rendered by a justice of the peace as well as where the execution was issued by the justice of the peace. *Foote-Patrick Co. v. Merkle*, 720.

2. *Same.*

The object of this statute is to place on record a permanent memorial of the judgment and execution, beyond the danger of loss from the many contingencies incident to the books and papers of justices of the peace, and also to have on record at the courthouse the evidence constituting a muniment of title to land. *Id.*

3. *Same.*

The record filed with the circuit clerk in order to obtain the enrollment of a judgment rendered by a justice of the peace does not meet this requirement, being in fact simply a mere abstract of the judgment itself. *Id.*

## FRAUD.

1. *Corporations. Fraud of organizer. Secret profits. Sales. Reservation of title.*

Where an organizer of a bank contracted for the bank for a safe, with a provision in the contract that title to the safe was to remain in the seller until fully paid for, the fact that there was a fraudulent agreement between the seller and the organizer, that a fictitious price should be placed on the safe, the organizer to get the difference between the real and fictitious price, did not make the sale one to the organizer, so as to constitute a waiver of the clause of the contract as to the retention of the title, nor prevent the seller from recovering the safe from the bank where no payments thereon had been made. *Hall v. Safety Co.*, 606.

2. *Estoppel. Deeds. Rights of parties. Fraudulent representations.*

Where parties in ignorance of the real facts are induced by misrepresentations to execute a deed to their lands, they are not thereby estopped from asserting their rights to the lands or from

---

FRAUDULENT CONVEYANCES

---

## FRAUD—Continued.

recovering the value thereof except as to *bona-fide* purchaser, for value without notice. *Carmichael v. Parks*, 710.

See RECEIVERS.

## FRAUDULENT CONVEYANCES.

1. *Bankruptcy. Transfer in violation of state law. Right of trustee.*

Under Code 1906, section 2522, so providing a transfer or conveyance of goods and chattels or lands between husband and wife is not valid as against any third person unless in writing, and acknowledged and filed for record, and a married woman's trustee in bankruptcy may recover for the benefit of her creditors a stock of goods transferred verbally by her to her husband. *McCabe v. Guido*, 858.

2. *Husband and wife. Transfer between. Validity as against third persons.*

Under section 2522, Code 1906, rendering invalid any verbal transfer of property between husband and wife as to third persons, the creditors of the wife have a right to attack her verbal transfer of property to her husband, whether her creditors be antecedent or subsequent to such transfer. *Id.*

3. *Bankruptcy. Transfers in violation of state laws. Right of trustees in bankruptcy.*

Where a wife made a verbal sale of a stock of goods and fixtures to her husband in violation of section 2522, Code 1906, this did not forbid the husband from making new purchases, nor from contracting in his own name, nor from conducting and operating the store in his own name. The store fixtures and property on hand constituting the subject of the alleged sale, may in such case be recovered by the wife's creditors or her trustee in bankruptcy. *Id.*

4. *Bankruptcy. Transfers. Rights of trustee.*

The trustee of a married woman in bankruptcy, was not entitled to recover from her husband the amount expended by her for the support and maintenance of herself and children during her husband's abandonment of his family, where the trustee was presumably suing only for creditors who had sold and delivered to the wife goods for mercantile purposes and not for creditors who supplied the wife with the necessities of life on the credit of her husband. *Id.*

---

GARNISHMENT—HUSBAND AND WIFE.

---

## GARNISHMENT.

*Assignment of indebtedness before garnishment. Effect.*

Since the statute on garnishment provides that the indebtedness and effects in the hands of the garnishee are bound from the date of the service of the writ, where an assignment of judgment is made, before notice of garnishment is served on the judgment debtor such assignment takes preference over the garnishment. *Pigford Grocery Co. v. Wilder*, 233.

## GIFTS.

*Rights. Promissory notes. Gifts inter vivos. Validity.*

Where a testator executed a demand note which was intended to evidence a mere gratuity, and delivered it to the payee, but such note was not in fact intended to be paid and was not paid before the maker's death, such a note cannot be upheld as a gift *inter vivos*. *Woods v. Sturges*, 412.

## GUARANTY.

*Contracts. Intent. Body of agreement. Signature.*

Where the body of an agreement shows a personal guaranty by the writer, though he signs the agreement as the agent of another, in such case the body of the agreement controls and not the signature, and the agreement will be held to be the personal guaranty of the agent and not of his principal. *Guar. & Acc. Co. v. Lumber Co.*, 534.

## HABEAS CORPUS.

*Judgment. Res judicata.*

Decrees in *habeas corpus* proceedings are *res adjudicata* only of the rights of the parties as the facts existed when the decree was rendered and not as they exist when the circumstances have changed. *Watts v. Smiley*, 12.

## HUSBAND AND WIFE.

*Transfer between. Validity as against third persons.*

Under section 2522, Code 1906, rendering invalid any verbal transfer of property between husband and wife as to third persons, the creditors of the wife have a right to attack her verbal transfer of property to her husband, whether her creditors be antecedent or subsequent to such transfer. *McCabe v. Guido*, 858.

---

INDICTMENT—INJUNCTION.

---

## INDICTMENT.

1. *Officers. Removal from office. Sufficiency.*

It is a universal rule that it is essential to the validity of an indictment that the material facts constituting the offense must be alleged with certainty. *Pruitt v. State*, 33.

2. *Insufficiency. Curing by bill of particulars. Code 1906, section 1309.*

Where an indictment under section 1309, Code 1906, providing for removal of officers if drunk when called upon to perform a duty was insufficient for not alleging the particular duty the officer was called upon to perform, such indictment was not cured by a bill of particulars furnished by the district attorney. *Ib.*

3. *Statute. Additional averments.*

It is well settled law in this state that indictments under a statute must go further than the language of the statute where it is necessary to charge the facts in order to inform the accused of the nature and cause of the accusation. *Ib.*

4. *Insurance. Mutual benefit insurance. Defenses. Misstatements in application.*

Code 1906, section 2675 (Hemmingway's Code, section 5141), requiring a copy of the application to be delivered with any policy or certificate of insurance, and providing that in default thereof the insurer shall not be permitted in any court to deny that any of the statements in the application are true, creates not a rule of evidence but a rule of substantive law, which became a part of the contract of insurance and hence applied to a benefit certificate issued while fraternal insurers were subject to its provisions, though the section was not brought forward into, Laws, 1916, chapter 206, by which fraternal orders are now governed. *W. O. W. v. Farmer*, 626.

See OFFICERS.

## INJUNCTION.

1. *Remedy. Scope.*

The law is well settled that a defendant in possession under a *bona-fide* claim of title should not summarily be removed by mandatory process in the chancery court, especially where there is no averment that irreparable damages will be done the complainants. *Russel v. Hickory*, 46.

2. *Quo warranto. Trying title. Remedy. De facto officers.*

An injunction will not be granted to prevent a party from exercising a public office pending proceedings to determine his right thereto. *Town of Sumner v. Henderson*, 64.

---

INSOLVENCY—INSURANCE.

---

## INSOLVENCY.

*See* RECEIVERS.

## INSURANCE.

1. *Mutual benefit insurance. Reasonable changes in by-laws.*

Where an insurance contract in a mutual benefit society provides that the insurance is granted by the society to the member with the distinct provision that the rights and benefits shall be subject to and be governed by the Constitution and by-laws of the fraternal society existing when the policy was issued or that may thereafter be adopted or amended by the society before the injury occurred, such a provision permits any reasonable change in the rights and benefits under the covenant by amendment or adoption of laws of the society which might increase or decrease the dues and assessments, or define an ambiguous term in the covenant, or reasonably reduce the benefits, and such change in the laws of the society is valid, if reasonable and is to be read into the contract as if written therein. *Butler v. E. H. of Columbian Woodmen*, 85.

2. *Mutual benefit insurance. Amendment of constitution. Reasonableness.*

Where at the issuance of a policy by a mutual benefit insurance society, the covenant or contract of insurance and the Constitution and by-laws of the society provided that the beneficiary should receive two hundred dollars in the event of a broken leg, and thereafter such provisions of the Constitution of the society was amended to provide that the beneficiary should be paid one hundred dollars in the event of a complete fracture of the thigh, involving either the upper or lower extremity, or the shaft of the bone, or in the event of complete fracture of either or both bones of the lower leg (*tibia*, or shin bone, or *fibula*), at either extremity or along the center or in event of the complete fracture of the knee cap, such amendment to the Constitution, defining what was meant by a broken leg, was reasonable and proper under the provision of the insurance contract, that the member's rights and benefit were subject to and governed by the Constitution and by-laws of the society as existing or amended. *Ib.*

3. *Indemnity policy. Offer and acceptance. Increased recovery.*

Where a policy of insurance indemnifying a railroad company against liability for personal injury suits, provided that the insurer would, at its own costs, investigate all accidents and defend all suits, and that when the insurer had the opportunity to settle the claim of any injured employee and failed to take



---

INSURANCE.

---

## INSURANCE—Continued.

advantage thereof it should become liable to an increased amount, provided that the offer of settlement was submitted to the insurer by the injured employee or his duly authorized representative, and an employee of insured was killed, and suit was brought against it by the administrator and also by the widow by her next friend and the widow made an offer of compromise to the railroad company, which was by it communicated to the insurer, but no offer was made by the administrator, or by the next friend, and recovery was had against the railroad company in an amount larger than that covered by the policy. In such case the offer of compromise not having been made by the duly authorized representative of the deceased employee the insurer was powerless to accept it, and was not liable to the insured in the increased amount over the face of the policy. *Georgia Life Ins. Co. v. Miss. Cent. R. Co.*, 114.

4. *Casualty insurance. Breach of warranty. Condition of health.*

In this case, which was a suit upon a policy of casualty insurance to recover the indemnity provided for the complete fracture of two or more ribs the court held that the evidence set out in the statement of facts herein was not sufficient to sustain the defense of a breach of warranty that insured was physically sound, materially affecting the risk, when at the time of his application, he had a chronic heart trouble. *Casualty Ins. Co. v. Lightsey*, 136.

5. *Mutual benefit insurance. By-laws as part of contract.*

Under a mutual benefit insurance policy so providing, the insured is bound by a by-law of the society adopted subsequent to the issuance of his policy, requiring an X-ray photograph to be furnished the society as a part of the proof of a disability covered by the policy, and the fact that members of his family were so ill during the time his arm was broken that he could not leave long enough to have such a photograph taken would not relieve him from his obligation to comply with this by-law. *E. H. of C. W. v. Wicker*, 211.

6. *Mutual benefit. Defenses. Condition precedent. Statute.*

Where a mutual benefit insurance policy is a dual one covering both life and physical disabilities, in so far as it is a disability policy it does not come within the terms of section 2636, Code, 1906, so that the failure of the insurer to file a copy of a by-law, requiring an X-ray photograph as part of the proofs of disability in case of a broken arm did not prevent the insurer from setting up the defense that such photograph was not furnished. *Id.*

---

INSURANCE.

---

## INSURANCE—Continued.

7. *Accident insurance. Construction. Severance of hand.*

Under an accident insurance policy providing a specific indemnity if insured should sustain the loss of a hand by severance at or above the wrist, where there was an injury to one of insured's hands whereby he lost the use of it to a great extent, such an injury was not covered by the terms of his policy, as "severance" means the removing any thing, etc., the act of severing or dividing, or separating, the state of being severed or separated, or the state of being disjointed or separated. *Metropolitan Casualty Ins. Co. v. Shelby*, 278.

8. *Actions. Question for jury. Peremptory instruction.*

In an action by an employer against a casualty company on its policy to indemnify such employer for all loss of money, etc., constituting larceny or embezzlement by an employee, it was improper for the court to grant a peremptory instruction for the employer, where the employee gave testimony which if true showed that the shortage in his account did not come about by any act of larceny or embezzlement on his part. *Casualty Co. v. Oil & Fertilizer Co.*, 283.

9. *Indemnity. Requirement that insured prosecute.*

It is a reasonable contract where one party is insuring against acts constituting larceny or embezzlement to stipulate that the assured shall give information and institute prosecution, when required to do so, of all offenses on the part of the employee insured against. *Ib.*

10. *Removal contracts. Presumptions.*

A court of equity will compel the issuance and delivery of an insurance policy after loss, where there has been a valid agreement for one before the loss and will enforce its payment as if made in advance and this will be done though the contract was by parol. *L. & L. & G. Ins. Co. v. Hinton*, 754.

11. *Same.*

Where an authorized agent of an insurance company orally agreed to renew a policy, but nothing was said about any change in its terms or the amount of the premium the terms of the new policy will be presumed to be the same as those in the old policy. *Ib.*

12. *Renewal. Terms.*

Where there had been a change in the partners of an insurance agency, since the issuance of an original policy—but the agent who actually wrote the policy continued as a member of the firm in such case the insurance agency was fully advised as to

---

INSURANCE.

---

## INSURANCE—Continued.

the old policy when it agreed to a renewal thereof and such renewal policy in the absence of agreement to the contrary will be without change of conditions and upon the same terms as the original policy. *L. & L. & G. Co. v. Hinton*, 754.

13. *Agents. Authority. Acts of company.*

An agent who has authority to issue policies of fire insurance stands in the stead of the company, and his acts and declarations with reference thereto are the acts and declarations of the company, and the company is bound thereby. *Ib.*

14. *Renewals. Premiums. Time due. Waiver.*

Where an insurance agency had not required advanced payments of premiums on two policies taken out previously by plaintiff, and he agreed orally for a renewal of one of them with a member of the agency who failed to demand payment of the premium at the time, and it was the custom of such agency to keep books and charge premiums for insurance and collect them when they desired. In such case by not demanding the premium when they agreed to renew the policy and by the course of dealing between the agency and plaintiff, the right to demand the premium before the issuance of the policy was waived. *L. & L. & G. Ins. Co. v. Hinton*, 754.

15. *Renewals. Contracts. Execution.*

A contract for the renewal of a fire policy becomes complete when an authorized agent of the insurer agrees to such renewal. *Ib.*

16. *Mortgage clause. Oral contract to substitute.*

An oral contract of renewal of insurance by an agent who has authority to write policies is valid and binding and an oral contract to substitute a mortgage clause in a policy is also good, since the mortgage clause is no more sacred nor formal an instrument than the insurance policy itself. *Hartford Ins. Co. v. Lumber Co.*, 822.

17. *Same.*

Where there is no clause in the policy providing that an insured must consent to the substitution of a mortgage clause and such substitution would not affect the interest of insured, it is not necessary to obtain the consent of insured to such substitution. *Ib.*

18. *Oral mortgage clause. Code 1906, section 2596.*

Under Code 1906, section 2596, providing that every fire insurance policy taken out by a mortgagor or grantor in a deed of trust shall have attached a mortgage clause in substantially the form set

---

INSTRUCTIONS—JUDGMENT.

---

## INSURANCE—Continued.

out in the section, there is no provision prohibiting any oral agreement to issue a mortgage clause, when this oral agreement is made, the statute simply defines what the clause is. To that extent it becomes a statutory insurance policy. *Ib.*

19. *Same.*

No additional consideration is required to be paid as a condition for the insertion of a mortgage clause the consideration paid by the original insurer constitutes a sufficient and valuable consideration for the contract between the insurance company and the mortgagee, since it imposes no increased hazard. *Ib.*

20. *Validity of policy. Estoppel.*

Where the general agent of the defendant insurance company, who had authority to do so, stated that a fire policy was effective as to plaintiff's interest, and that he would make out the necessary mortgage clause, he thereby waived the actual writing of the mortgage clause and in such case the insurance company was estopped to make any of these contentions. *Ib.*

## INSTRUCTIONS.

*See TRIAL.*

## INTENTION.

*See MORTGAGES; CONTRACTS; WILLS.*

## INTERSTATE COMMERCE.

*See COMMERCE.*

## JUDGMENT.

1. *Opening default judgment. Power of court. Code 1906, section 4687.*

In a suit by the state against a sheriff and a surety on his official bond to the use of one for whom the sheriff had negligently failed to provide the jail accommodations required by section 4687, Code 1906, where service was had on the surety, but the sheriff was not found and a judgment by default was taken against the surety at the return term, and the surety appeared before the expiration of the return term and sought to have the judgment by default set aside which the court denied and a writ of inquiry was awarded and the case continued, and at the next term the motion to set aside was renewed, which was supported by the appearance of the sheriff ready to defend on the issue of liability and the court again refused to set aside the judgment by default and so the question of liability of the sheriff was

---

JUDGMENT.

---

## JUDGMENT—Continued.

never tried by a jury. In such case the lower court's denial of the surety's motion to set aside the default judgment on the ground that it had no power to do so was error, in view of the facts that the sheriff's liability was not tried on its merits. *U. S. Fid. & Guar. Co. v. State ex rel.*, 1.

2. *Habeas corpus. Res judicata.*

Decrees in *habeas corpus* proceedings are *res adjudicata* only of the rights of the parties as the facts existed when the decree was rendered and not as they exist when the circumstances have changed. *Watts v. Smylie*, 12.

3. *Res judicata. Decree in partition.*

Where a decree in a former partition suit, following the pleadings and proof adjudicated the amounts paid for taxes by defendants therein, together with the improvements of the land all of which went to offset the claim of rents and profits due the plaintiff therein for use and occupation of the land for the years prior to that time which decree was affirmed on appeal by defendants, who gave a supersedeas bond conditioned to pay all damages and rents awarded by the supreme court on final hearing of the appeal. In such case the defendants therein are precluded from again claiming as an offset to the rents and profits the taxes paid by them on the land prior to the original decree, the matter being *res adjudicata*. *Vinson et al. v. Colonial & United States Mortgage Co. et al.*, 59.

4. *Res judicata. Matters necessarily involved.*

In such case even though the taxes were not pleaded, proven, and adjudicated by the lower court as an offset to the rents and profits, they might and should have been, as being necessarily involved so that the claim is therefore *res judicata*. *Ib.*

5. *Merger of rights of litigants.*

When judgment has been rendered all rights of litigants are merged in the judgment, and such judgment is assignable without any requirement to file a written assignment in the papers of the case in which the judgment was rendered. *Pigford Grocery Co. v. Wilder*, 233.

6. *Parties. Persons not before the court.*

Whether or not a provision in a deed that "on the death of my daughter W, without heirs born to her, then this land revert to one of my heirs," is a gift over of the land in the event of the death of W without such heirs, cannot be presented to the court for decision until that event happens and the person to then take, should this provision be held to be a gift over, is before the court. *Liberty Bank v. Wilson*, 377.

---

JUDGMENT.

---

## JUDGMENT—Continued.

7. *Bills and notes. Rights of parties.*

If the original payee of a note released the maker in consideration of a deed to the payee's wife and this was known to the assignee of the note who was a mere volunteer, then the maker was entitled to a cancellation of the note and trust deed. *Bass v. Barries*, 419.

8. *Equitable relief. Grounds. Defense not interposed.*

Where a corporation leased turpentine lands for two turpentine seasons; the lease providing that the lessee defendant should be reimbursed at a fixed rate per cup for any land included in the contract of which the lessor might deprive him of possession and the lessor corporation assigned the rent notes to its secretary and general manager, who was the owner of practically all of the capital stock of the lessor corporation and these notes on his death passed to his wife, who recovered judgment thereon. In such case since any breach of the lessor's agreement entitling the lessee to reimbursement occurred before judgment on the notes, such judgment was conclusive, and execution thereon could not be enjoined, there being no evidence of fraud, accident or mistakes. *Dibert v. Durham*, 469.

9. *Execution. Injunction. Grounds.*

In such case where there was no fraud, accident or mistake in the execution of the written lease and no showing that the turpentine privileges were not worth the consideration agreed to be paid, the execution on a judgment on the rent notes in favor of the transferee will not be enjoined, because the lessee had a right of action for damages against the lessor, neither the lessor nor transferee being insolvent. *Ib.*

10. *Res judicata. Issues not decided.*

Even though the relief sought in a second suit may be different from that asked in the first suit, yet, where the causes of action are substantially the same, the question is *res judicata*. *Harrison v. Turner*, 550.

11. *Same.*

Where the pleadings in a case present issues involved in such case, which might have been litigated therein, as well as those actually litigated, they are *res judicata*. *Ib.*

12. *Same.*

All issues which, under the pleadings, might have been decided in a suit, are *res judicata*, whether they were litigated or not, and even though the court failed through inadvertence or mistake to pass on some of the issues. *Ib.*

---

JUDICIAL NOTICES—LANDLORD AND TENANT.

---

## JUDGMENT—Continued.

13. *Default judgment. Sufficiency of pleadings.*

A bill in chancery by one partner to cancel and annul a default judgment against a partnership consisting of two brothers on the ground that the judgment was void on the face of the record, because the exhibits filed with the declaration contradicted its averments, will not be sustained, where the declaration averred a course of dealing between the defendant and plaintiff which resulted in defendant being indebted to plaintiff in a specifically named amount, and with the declaration an exhibit was filed which showed the dates of the money advanced, how the advances were made, and upon whose drafts the payment was made; although the memoranda or statement filed with the declaration showed that the other partner drew the drafts which were paid, presumably in his own name, but the declaration averred that the advances were thus made to the partnership. *McShane Cotton Co. v. Smith*, 779.

14. *Same.*

Such declaration in the original suit upon which a judgment by default was rendered will be construed to charge that the complainant in the chancery suit together with his brother was engaged in a certain business and that one of them, for both, drew certain drafts for the joint account which were paid by plaintiff in the original declaration, and if defendant desired to be enlightened as to just what he was charged with he should have appeared and made his defense if any he had. If his brother was not authorized to draw the drafts for the account of the partnership, then was the time for him to speak. If he was not a partner, he should have reasonably so pleaded in response to the summons served on him. *Ib.*

*See* EXECUTION.

## JUDICIAL NOTICES.

*See* EVIDENCE.

## JUSTICE OF THE PEACE.

*See* EXECUTION.

## LANDLORD AND TENANT.

1. *Grounds for receiver. Chattel mortgage.*

A trust deed on stock, machinery, and crops given by a tenant to his landlord for a past year, is not basis for the appointment of a receiver to farm the rented premises and use the debtor's property for the current year. The only thing the landlord

---

LEVEES.

---

## LANDLORD AND TENANT—Continued.

can do is to sell the property covered by the trust deed either in equity or by the trustee, and the tenant is entitled, where the tenancy is treated as terminated, to an early sale. *Burton v. Pepper*, 139.

2. *Chattel mortgages. Action for possession. Receivers. Summary action.*

A landlord cannot gain possession of the rented premises, from the tenant by the summary appointment of a receiver without notice. *Ib.*

3. *Chattel mortgages. Unlawful use of property by landlord. Right to rent.*

Where a landlord having taken a deed of trust on the machinery and stock of his tenant for supplies to be furnished, had a receiver appointed before planting the crop, and without any order therefor spent money and used the tenant's stock and machinery, taking full control of the property though doing so in the name of the receiver, pending a delayed foreclosure of the trust deed. In such case the lease will be held to have been terminated and the tenant was not chargeable with rent after the receiver was appointed. *Ib.*

4. *Damages. Duty to reduce damages. Landlord's lien.*

A landlord cannot pay to his tenant who is indebted to him sums of money in excess of the amount due by the tenant, and thereafter recover the amount due by the tenant from a purchaser of products of the tenant in good faith. *Scott & Garrett v. Lumber Co.*, 524.

5. *Same.*

In such case the landlord could not be required to apply any money which would be exempt to the tenant to the liquidation of his debts, but he must use reasonable means to reduce his damages. *Ib.*

## LEVEES.

1. *Privilege taxes. Power of legislature.*

It is too late now to question the power of the legislature to create taxing districts and confer on such taxing districts or municipal corporations, the power of taxation, section 237 of the Constitution in dealing with this specific question confers full power upon the legislature to provide such system of taxation for said levee district as the legislature shall from time to time deem wise and proper. The legislature has full power to impose a privilege tax, or to authorize the levee commissioners to do so. *Tel. & Cable Co. v. Robertson*, 204.



---

LIABILITY—LICENSES.

---

## LEVEES—Continued.

2. *Tax by Commissioner. Notice.*

Under the Act of 1902, chapter 80, authorizing the levee commissioner to impose a privilege tax in said district by an order entered upon its minutes, it was not required that the order levying privilege taxes should be published in a newspaper or otherwise, except that a copy of the order should be sent to the sheriffs of the several counties of the levee district. It did not require the levee board to give notice to persons or corporations desiring to exercise privileges in the district, nor was it necessary for the board to give such notice in order to make the ordinance valid, all persons being charged with notice under the statute, of the power of the board to levy privilege taxes upon occupations, privileges and businesses. *Tel. N Cable Co. v. Robertson*, 204.

## LIABILITY.

See BANKS AND BANKING; CARRIERS; COUNTIES; MUNICIPAL CORPORATIONS; RAILROADS; TELEGRAPHS AND TELEPHONES.

## LIABILITY AND TORTS.

*Joint and several liability.*

It is settled in this state that tort-feasors may be sued jointly and severally, and that one joint tort-feasor is not released from liability by suit or judgment against the others, but that it requires a satisfaction or payment to satisfy the liability against joint tort-feasors. *Sawmill Const. Co. v. Bright*, 491.

## LICENSES.

1. *Commerce. Interstate commerce. Employment agencies.*

Laws 1912, chapter 94, requiring employment agencies hiring laborers to go out of the state, to pay a license fee of five hundred dollars in every county in which they operate, is neither a burden or tax on interstate commerce. *Garbutt v. State*, 424.

2. *Same.*

This act, does not undertake to tax one who solicits or hires laborers for his own use or employment, but the tax is laid upon the person doing a regular business of emigrant or employment agent. *Ib.*

3. *Same.*

Such license is not prohibitory. *Ib.*

4. *Same.*

The amount of a license tax is primarily a legislative question. *Ib.*

---

LIMITATION OF ACTIONS—MECHANICS' LIENS.

---

## LIMITATION OF ACTIONS.

1. *Effect of administration. Claims.*

Under Code 1906, section 3113, so providing, a debt not barred by limitation at the death of the debtor remains alive in any event for at least one year after the death of the debtor. *Duffey v. Kilroe*, 7.

2. *Effect of administration. Claims.*

Under Code 1906, section 2110, so providing the proper probaton and registering of claims against the estate of a decedent, stops the general statute of limitations against it. *Ib.*

3. *Effect of administration. Claims.*

Code 1906, section 3105, providing that action may not be brought against an executor or administrator on a judgment or other cause of action against deceased, but within four years after the qualification of an executor or administrator is the only statute of limitations applicable after a claim not then barred by a general statute has been registered and probated. *Ib.*

4. *Statute of limitation. Interruption by absence from state.*

Under Code 1906, section 3108, providing that, if the person against whom a cause of action has accrued be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action after his return, the phrase "be absent from and reside out of the state" in this statute applies to an unmarried woman who went to California to work as a domestic servant intending to return to this state when she had earned enough to pay off an incumbrance on her property. *Hendricks v. Kellogg*, 22.

See PUBLIC LANDS.

## MECHANICS' LIENS.

*Notice. priorities. Code 1906, section 3072-3074.*

Section 3072, Code 1906, making all liens on the same building concurrent and payable in proportion out of the proceeds of the property when sold, applies only to liens for materials furnished to the owner or labor rendered under contract with the owner and does not apply to subcontractors, laborers, and materialmen, who under the provision of section 3074 may bind the amount due the contractor by written notice to the owner, in the order in which their notices are given. *Lumber & Mfg. Co. v. Garber*, 229.

---

MARRIAGE—MASTER AND SERVANT.

---

## MARRIAGE.

1. *Wills. Revocation.*

The reason upon which the rule of the common law that a will made by a *feme sole* was revoked by her subsequent marriage was based, was that marriage destroyed the ambulatory nature of the will and left it no longer subject to the wife's control, but since our statutes removing the disabilities of coverture, beginning with chapter 496, page 725, Laws 1866-67, having conferred full testamentary capacity upon married women, the reason of the rule has ceased, and consequently so has the rule itself. *Lee v. Blewett*, 341.

2. *Presumptions. Divorce from former wife.*

A marriage duly proved will be presumed valid, although a former wife of the man may be still living and there be no evidence of a divorce from her, the burden of proof to show the negative fact that there was no divorce being on the party who denies the validity of the second marriage. *Aldridge v. Aldridge*, 385.

## MARRIED WOMEN.

See MARRIAGE.

## MASTER AND SERVANT.

1. *Municipal corporations. Police powers. Sanitation.*

A city under its police powers as a part of its governmental duties has the right to adopt ordinances relating to the cleaning of cesspools, the removing of garbage, etc. It also has the right as one of its governmental functions to adopt an ordinance requiring that this work be done exclusively by any party designated to do it by the city. *City of Gulfport v. Sheppard*, 439.

2. *Municipal corporations. Police powers. Sanitation. Governmental functions.*

The adoption of ordinances regulating the cleaning of cesspools and removing garbage, and requiring it to be done only by a sanitary contractor chosen by the city, are "governmental functions" and the city is not liable in damages for injuries caused by the negligent performance of such work. *Ib.*

3. *Municipal corporations. Injuries to persons. Sanitation. Negligence of employee.*

Where a sanitary contractor was designated by the city but whose work was on behalf of property-owners and paid for by them he was not an employee of the city but an independent contractor and it was not liable for injuries to pedestrians caused by the negligence of his employee in replacing the cover of a cesspool which he had cleaned out. *Ib.*

---

MASTER AND SERVANT.

---

## MASTER AND SERVANT—Continued.

4. *Relation. Performing service for another.*

A person who is in the general employment of one person may be temporarily in the service of another with respect to a particular transaction or piece of work, so that the relation of master and servant arises between them as where an employer lends his employee to a third person for a particular employment, the employee for anything done in the particular employment, is the employee of the third person, though he remains the general employee of the employer. *Sawmill Const. Co. v. Bright*, 491.

5. *Relation. Question for jury.*

Whether or not plaintiff who was employed and paid by one party, but was injured while cranking an engine at the request of a foreman of another party was at the time of the accident the servant of the other party was a question for the jury. *Ib.*

6. *Injuries to servant. Contributory negligence.*

Where the line of shafting which caused the injury and death of a deceased servant was unprotected and uninclosed and, revolving at a high rate of speed, was apt to cause the clothing of persons passing near it to entwine around and throw them upon the shafting, and it was liable in case the belt was being sewed to cause the strings of the belt to strike against the rapidly revolving shaft and jerk and draw a person holding it, upon the shafting, and injure him, and the shafting could have been inclosed and rendered safe at a trifling expense and all danger thus avoided. In such case the master did not furnish the servant so killed with a safe place to work. *Huff v. Bear Creek Mill Co.*, 509.

7. *Same.*

In such case even though the servant was guilty of contributory negligence, this under our statute would not constitute a defense but would only entitle the master to measure his negligence against the negligence of the employee. *Ib.*

8. *Trial. Instructions. Matters admitted.*

Where in a suit by a servant against the master for damages caused by falling through a trap door, the master admitted the dangerous condition of the door and based its defense upon the theory that the servant was cautioned not to get upon it. In such case an instruction for the plaintiff that the door through which plaintiff fell was inherently dangerous did not constitute error. *Newton Oil Mill v. Spencer*, 568.

---

MERGER—MORTGAGES.

---

## MASTER AND SERVANT—Continued.

9. *Question for jury. Application of fellow servants' doctrine. Laws 1908, chapter 194. Hemmingway's Code, section 6684.*

Where an employee of a railroad company while employed in loading rails upon a flat car was injured because some of his fellow servants gave an unusual or sudden jerk to the rail which they were lifting to place upon the car which caused it to fall and injure his leg and there was no evidence as to why such sudden and unusual jerk was given in such case a peremptory instruction for the defendant was erroneous. *Lockman v. Alabama & V. Ins. Co.*, 772.

10. *Same.*

In such case the jury would have been warranted in finding that plaintiff was injured because of the negligence of a fellow servant while engaged in loading a car for transportation over defendant's railroad so that the case would fall within chapter 194, Laws 1908 (Hemmingway's Code, section 6684), giving railroad employees the same rights and remedies for injuries caused by an act or omission of the railroad company as are allowed by law to other persons not so employed. *Ib.*

## MERGER.

*See* JUDGMENTS.

## MORTGAGES.

1. *Trust deeds. Foreclosure. Notice. Sufficiency. Code 1906, sections 1607-2772.*

Under Code 1906, section 2772, providing that sales of lands under mortgages shall be advertised for three consecutive weeks preceding such sales, and section 1697 providing that when publication is required for three weeks, it shall be sufficient to publish once each week for three weeks, though there be not three weeks between the first and last publication, but there must be three weeks between the first publication and the day for appearance of the party, a notice of foreclosure sale which was published on October 8, 15, 22 and 29 followed by a sale on November 2nd, and a publication on July 7, 14, 21 and 28, followed by a sale on July 31, were sufficient; less than a week having elapsed between the day of the last notice and the day of sale in each case. *Lake v. Castleman*, 175.

2. *Trust deeds. Foreclosure. Time of sale. Code 1906, sections 2772, 2821-3984.*

Where a trust deed provided that the trustee may take possession of the trust property and sell the same at public outcry after

---

MUNICIPAL CORPORATIONS.

---

## MORTGAGES—Continued.

giving legal notice of the time, place and terms of the sale in the county in which the property is situated, it was sufficient that he complied with section 2772, Code 1906, as to notice of the sale, and it was not necessary to hold the sale in accordance with sections 2821 and 3984, which fix the time for sale only when the trust deed itself is silent as to the place and terms of sale and mode of advertising. *Shoe Co. v. Lynchburg*, 188.

3. *Pleading. Innocent purchasers.*

In a suit to foreclose a trust deed securing a note, a demurrer was properly overruled to a cross-bill charging that complainant was not a purchaser for value and that he did not take the assignment of the note and deed of trust for the purpose of vesting any title or interest in him to either. *Bass v. Barries*, 419.

4. *Deeds of trust. Assignment of debt. Recording. Code 1906, section 2794.*

Under section 2794, Code 1906, providing for notation on the margin of the record of assignments of debts secured by mortgages or trust deeds, it is not required that assignments of recorded instruments shall be recorded on any particular page or pages of the record books, and where the original trust deed or the assignment of the same, the refusal of the original trustee to act, and the appointment of another trustee, all appear on the margin of the same page of the record, it was a sufficient compliance with the statute. *West v. Union Naval Stores Co.*, 743.

5. *Extinguishment.*

If it be the intention of parties in purchasing a prior deed of trust on property, upon which they have some claim to keep the prior mortgage or deed of trust alive, then this intention should govern. *Hartford Ins. Co. v. Lumber Co.*, 822.

## MUNICIPAL CORPORATIONS.

1. *Charters. Amendments. Recording. Code 1906, Section 3444.*

Under Code 1906, section 3444, providing that amendments to municipal charters when approved by the governor shall be recorded upon the records of the mayor and board of aldermen "and when so recorded, shall have the force and effect of law." When it appears that the amendment is not recorded, it will not have "the force and effect of law." *Williams v. City of Vicksburg*, 79.

---

MUTUAL BENEFIT INSURANCE—NEGLIGENCE

---

## MUNICIPAL CORPORATIONS—Continued.

2. *City clerk. Liability on official bond.*

Where a city ordinance required all moneys collected by the superintendent of a municipal street car line to be paid into the city depository, but in violation thereof the superintendent paid such collections to the city clerk who was only authorized to collect moneys due for city privilege tax licenses. In such case the city clerk did not receive such moneys by virtue of his office or under color of his office, and the surety on his official bond was not liable for his defalcation, since he had no apparent authority to receive the money and before an act can be said to be done under color of office there must be an appearance of right under the law to do the act. *Fidelity & Guar. Co. v. Yazoo City*, 358.

3. *Police powers. Sanitation.*

A city under its police powers as a part of its governmental duties has the right to adopt ordinances relating to the cleaning of cesspools, the removing of garbage, etc. It also has the right as one of its governmental functions to adopt an ordinance requiring that this work be done exclusively by any party designated to do it by the city. *City of Gulfport v. Sheppard*, 439.

4. *Police powers. Sanitation. Governmental functions.*

The adoption of ordinances regulating the cleaning of cesspools and removing garbage, and requiring it to be done only by a sanitary contractor chosen by the city, are "governmental functions" and the city is not liable in damages for injuries caused by the negligent performance of such work. *Id.*

5. *Injuries to persons. Sanitation. Negligence of employee.*

Where a sanitary contractor was designated by the city but whose work was on behalf of property-owners and paid for by them he was not an employee of the city but an independent contractor and it was not liable for injuries to pedestrians caused by the negligence of his employee in replacing the cover of a cesspool which he had cleaned out. *Id.*

## MUTUAL BENEFIT INSURANCE.

*See* INSURANCE.

## NEGLIGENCE.

1. *Carriers. Carriage of passengers. Presumption. Res ipsa loquitur.*

Where a passenger on an electric car received a shock while leaning against a controller, and such shock was ordinarily impossible in the absence of negligence, a presumption of negligence

---

NOTICE.

---

## NEGLECT—Continued.

on the part of the carrier arises under the doctrine of *res ipsa loquitur*. *G. & M. Coast Traction Co. v. Hicks*, 164.

2. *Master and servant. Injuries to servant. Contributory.*

Where the line of shafting which caused the injury and death of a deceased servant was unprotected and uninclosed and, revolving at a high rate of speed, was apt to cause the clothing of persons passing near it to entwine around and throw them upon the shafting, and it was liable in case the belt was being sewed to cause the strings of the belt to strike against the rapidly revolving shaft and jerk and draw a person holding it, upon the shafting, and injure him, and the shafting could have been inclosed and rendered safe at a trifling expense and all danger thus avoided. In such case the master did not furnish the servant so killed with a safe place to work. *Huff v. Bear Creek Mill Co.*, 509.

3. *Same.*

In such case even though the servant was guilty of contributory negligence, this under our statute would not constitute a defense but would only entitle the master to measure his negligence against the negligence of the employee. *Ib.*

4. *Telegraphs and telephones. Stipulations as to liability. Effect.*

A telegraph company cannot contract against its own negligence and a stipulation on the back of a telegram undertaking to exempt the telegraph company from liability for its negligence in transmitting a message, though an unrepeatable one, is invalid and the company is responsible for losses occasioned by its negligence in transmission. *Lumber Co. v. Telegraph-Cable Co.*, 660.

5. *Pleadings. Conclusions.*

In a suit for damages caused by negligence it is not sufficient to allege negligence as a mere conclusion or inference. Facts must be pleaded showing negligence. *Horton v. Lincoln Co.*, 813.

---

NOTICE.

---

1. *Receiver. Appointment. Necessary. Good cause. Code 1906, Section 625.*

Under Code 1906, section 625, providing that "good cause" must be shown why notice should not be given only the greatest emergency will entitle one to the appointment of a receiver without notice. Mere insolvency does not justify the appointment of a receiver to take charge of the assets of an individual debtor. *Burton v. Pepper*, 139.



---

OFFICERS.

---

## NOTICE—Continued.

2. *Mortgages. Trust deeds. Foreclosure. Sufficiency. Code 1906, sections 1607-2772.*

Under Code 1906, section 2772, providing that sales of lands under mortgages shall be advertised for three consecutive weeks preceding such sales, and section 1697 providing that when publication is required for three weeks, it shall be sufficient to publish once each week for three weeks, though there be not three weeks between the first and last publication, but there must be three weeks between the first publication and the day for appearance of the party, a notice of foreclosure sale which was published on October 8, 15, 22 and 29 followed by a sale on November 2nd, and a publication on July 7, 14, 21 and 28, followed by a sale on July 31, were sufficient; less than a week having elapsed between the day of the last notice and the day of sale in each case. *Lake v. Castleman*, 175.

3. *Drains. Formation of drainage districts. Notice to landowner. Statute.*

Laws 1912, chapter 195, as amended by Laws 1914, chapter 269, providing for the organization of drainage districts do not contemplate that the published notice to the owners of the land shall be directed to each owner by name. The proceedings prescribed were and are *in rem* and are of such a nature as would arrest the attention of all interested persons and any other method would be impracticable. *Wooten v. Hickahala Drainage District*, 787.

See MECHANICS' LIENS; MORTGAGES.

## OFFICERS.

1. *Removal from office. Indictment. Sufficiency. Code 1906, Section 1309.*

Under Code 1906, section 1309, providing that an officer who shall be drunk when called on to perform the duties of his office shall be removed, it is necessary that the indictment should set out the particular duty which the defendant was called upon to perform at the time he is alleged to have been drunk. *Pruitt v. State*, 33.

2. *Same.*

Merely being drunk occasionally, while not discharging a duty, nor being called upon to do so would not come within the statute. *Ib.*

---

PARENT AND CHILD.

---

## OFFICERS—Continued.

3. *Trying title to office. Parties. Town.*

The town is not a proper party complainant to a suit by three claimants to oust three others from the office of aldermen and members of the board of school trustees. *Town of Sumner et al. v. Henderson et al.*, 64.

4. *Quo warranto. Trying title. Remedy. Defacto officers.*

Where defendants were appointed by the Governor to the offices of alderman and members of the board of school trustees and were discharging the duties of such office, this constituted them *de facto* officers, and the only remedy of plaintiffs claiming title to the office was by *quo warranto*. *Ib.*

5. *Municipal corporations. City clerk. Liability on official bond.*

Where a city ordinance required all moneys collected by the superintendent of a municipal street car line to be paid into the city depository, but in violation thereof the superintendent paid such collections to the city clerk who was only authorized to collect moneys due for city privilege tax licenses. In such case the city clerk did not receive such moneys by virtue of his office or under color of his office, and the surety on his official bond was not liable for his defalcation, since he had no apparent authority to receive the money and before an act can be said to be done under color of office there must be an appearance of right under the law to do the act. *Fidelity & Guar. Co. v. Yazoo City*, 358.

*See* COUNTIES; INJUNCTION.

## PARENT AND CHILD.

1. *Habeas corpus. Custody of child. Right of mother.*

Upon the death of the father the duty of supporting the child devolves upon its mother, unless it possesses in its own right property sufficient for that purpose or is old enough and capable of earning its own living, and the mother is also entitled to its custody unless her character or surroundings are such as to unfit her therefor. *Watts v. Smylie, et al.*, 12.

2. *Divorce. Custody of child. Rights of mother.*

Even though a mother failed to discharge her duty to her child during its father's lifetime, that fact would not absolve her from her moral and legal duty to support and care for it after its father's death, nor of itself alone deprive her of her right to its custody, after its father's death. *Ib.*

*See* DEATH.

---

PARTIES—PARTITION.

---

## PARTIES.

1. *Officers. Trying title to office. Town.*

The town is not a proper party complaint to a suit by three claimants to oust three others from the office of alderman and members of the board of school trustees. *Town of Summer et al. v. Henderson et al.*, 64.

2. *Judgment. Persons not before the court.*

Whether or not a provision in a deed that "on the death of my daughter W, without heirs born to her, then this land revert to one of my heirs," is a gift over of the land in the event of the death of W without such heirs, cannot be presented to the court for decision until that event happens and the person to then take, should this provision be held to be a gift over, is before the court. *Liberty Bank v. Wilson*, 377.

3. *Judgments. Trust deeds. Cancellation. Interest affected.*

Where in a suit by the assignee to foreclose a trust deed securing a note, the maker by cross-bill sought a cancellation of the note, the interest of the original payee who was not a party to the suit, could not be affected. *Bass v. Barries*, 419.

See COUNTIES.

## PARTITION.

1. *Pleading. Sufficiency. Code 1906, section 1649.*

Under Code 1906, section 1649, providing that land shall descend to children and wife in equal parts, where a bill for partition alleged that all the parties were children of the deceased owner except one who was the wife of deceased, that the land was not a homestead nor exempt, that defendants, the wife and a part of the children, refused to let plaintiff enter and occupy the lands, such a bill was not subject to the demurrer of the wife and other defendants on the grounds that there was no equity in the bill, and that it showed on its face that the wife was entitled to the use of the lands mentioned in the bill as a homestead during her widowhood. *Gavin v. Gavin*, 197.

2. *Accounting. Trust.*

Even though a bill attempted to partition exempt land without the widow's consent, a demurrer to it should not be sustained and the bill dismissed where it also asked for an accounting for timber cut by the widow. *Id.*

3. *Right to partition. Effect of provisions of will.*

Where a testator left the bulk of his estate to his executors to be managed by them during their lifetime, but not exceeding twenty-

---

PARTNERSHIP—PERPETUITIES.

---

## PARTITION—Continued.

five years for the benefit of themselves, the testator's widow and the other children. The will further provided that on the death of both executors but not later than twenty-five years from the testator's death, the trust should be closed up and all property divided. The estate consisted of an undivided one-half interest in real estate; the other undivided one-half of which was owned by one of the sons, who was named as one of the executors and trustees. In such case there was nothing in the will which limited the right of the son owning an undivided one-half interest in the real estate to have a partition of the lands owned by deceased, his father, and himself as tenants in common. *Gwin et al. v. Gwin*, 619.

See JUDGMENT.

## PARTNERSHIP.

*Corporations. Pleading organization. Report to secretary of state.*

Where in a suit by a bank on a note against the members of a firm, one of the defendants filed a special plea under oath denying that he was ever a member of the firm, and alleging that the note sued upon was in consideration of an indebtedness owing by a corporation of the same name as the alleged firm, organized under the laws of the state, this was sufficient though the plea did not state that the organization of the corporation was reported within thirty days to the secretary of state for even had such report been necessary when the corporation was organized, such defective organization was an affirmative matter which the bank should have set up by replication to the defendant's special plea. *Rayburn v. Bank of Commerce*, 54.

See ASSIGNMENTS.

## PAYMENTS.

*Application.*

Payments made upon an open account should be applied to the oldest items on the account, where neither party makes an application to any particular item. *Duffey v. Kilroe*, 7.

See BONDS.

## PERPETUITIES.

1. *Devise for more than two lives. Code 1906, Section 2765.*

Under Code 1906, section 2765, Hemmingway's Code, section 2269, providing that a conveyance or devise can be made in succession to two lives in being, then to the heirs of the body of the

---

PLEADING.

---

## PERPETUITIES—Continued.

remainderman or right heirs of the donor, in fee simple, where the third in succession is not such an heir, the grant or devise is void, since such statute governs all grants and devises to a succession of donees in so far as the number thereof and the class to which the last donee must belong is concerned and a grant or devise in violation of it is void. *Bibby v. Broome*, 70.

2. *Burden of proof. Code 1906, Section 2765.*

Under Code 1906, section 2765, Hemmingway's Code, section 2765, providing that a conveyance or devise can be made in succession to two lives in being then to the heirs of the remainderman or right heirs of the donor; the rule is that, unless and until the contrary appears the third donee will be presumed to be within one of the classes referred to in the statute. In other words, the burden of proving that such a donee is neither an heir of the body of the remainderman nor a right heir of the donor, is upon him who seeks to avoid the grant or devise for that reason. *Ib.*

## PLEADING.

1. *Equity. Amendment of bill. Exhibits.*

Even though a copy of a probated account sued on should have been filed with and as an exhibit to the bill, still it was not error for the court to allow the bill to be so amended as to refer to the account which was then on file as an exhibit thereto. *Duffey v. Kilroe*, 7.

2. *Quieting title. complaint. Sufficiency.*

In all suits to confirm title or to remove clouds it is the duty of the complainant to deraign title and in deraigning title, a general statement that the complainant is the real owner is insufficient. *Russell et al. v. Town of Hickory*, 46.

3. *Partnership. Corporations. Pleading organization. Report to secretary of state.*

Where in a suit by a bank on a note against the members of a firm, one of the defendants filed a special plea under oath denying that he was ever a member of the firm, and alleging that the note sued upon was in consideration of an indebtedness owing by a corporation of the same name as the alleged firm, organized under the laws of the state, this was sufficient though the plea did not state that the organization of the corporation was reported within thirty days to the secretary of state for even had such report been necessary when the corporation was organized, such defective organization was an affirmative matter which the bank should have set up by replication to the defendant's special plea. *Rayburn v. Bank of Commerce*, 54.

---

PLEADING.

---

## PLEADING—Continued.

4. *Partition. Pleading. Sufficiency. Code 1906, section 1649.*

Under Code 1906, section 1649, providing that land shall descend to children and wife in equal parts, where a bill for partition alleged that all the parties were children of the deceased owner except one who was the wife of deceased, that the land was not a homestead nor exempt, that defendants, the wife and a part of the children, refusal to let plaintiff enter and occupy the lands, such a bill was not subject to the demurrer of the wife and other defendants on the grounds that there was no equity in the bill, and that it showed on its face that the wife was entitled to the use of the lands mentioned in the bill as a homestead during her widowhood. *Gavin v. Gavin*, 197.

5. *Partition. Accounting. Trust.*

Even though a bill attempted to partition exempt land without the widow's consent, a demurrer to it should not be sustained and the bill dismissed where it also asked for an accounting for timber cut by the widow. *Ib.*

6. *Withdrawal of plea. Abandonment of defense.*

Where in an action by a fertilizer company against a casualty company on its policy to indemnify for loss sustained by larceny or embezzlement of employees, the casualty company filed a plea setting up that it was unlawful for the fertilizer company to operate a gin after the passage of chapter 162, Laws 1914, but withdrew the plea though it moved to strike out the evidence and grant it a peremptory instruction, basing the statute as a ground therefor. In such case the court had a right to treat the defense as having been abandoned with the withdrawal of the plea. *Casualty Co. v. Fertilizer Co.*, 283.

7. *Set-off. Code 1906, section 741.*

Under Code 1906, section 741, so expressly providing the general issue and a set-off may be pleaded together. *Weil Bros. v. Wittjen*, 514.

8. *Conclusions. Negligence.*

In a suit for damages caused by negligence it is not sufficient to allege negligence as a mere conclusion or inference. Facts must be pleaded showing negligence. *Horton v. Lincoln Co.*, 813.

9. *Judgment. Default judgment. Sufficiency of pleadings.*

A bill in chancery by one partner to cancel and annul a default judgment against a partnership consisting of two brothers on the ground that the judgment was void on the face of the record,

---

POLICE POWERS—PROCESS.

---

## PLEADING—Continued.

because the exhibits filed with the declaration contradicted its averments, will not be sustained, where the declaration averred a course of dealing between the defendant and plaintiff which resulted in defendant being indebted to plaintiff in a specifically named amount, and with the declaration an exhibit was filed which showed the dates of the money advanced, how the advances were made, and upon whose drafts the payment was made; although the memoranda or statement filed with the declaration showed that the other partner drew the drafts which were paid, presumably in his own name, but the declaration averred that the advances were thus made to the partnership. *McShane Cotton Co. v. Smith*, 779.

*See EVIDENCE; INDICTMENTS; QUIETING TITLE.*

## POLICE POWERS.

*See MUNICIPAL CORPORATIONS.*

## PRACTICE.

*See PARTITION.*

## PRESUMPTIONS.

*See EVIDENCE.*

## PROCESS.

1. *Service of summons on absent defendant. Code 1906, Sec. 3926. Member of family.*

Under Code 1906, section 3926 (Hemmingway's Code, section 2933), providing that summons shall be served if the defendant cannot himself be found in the county, by leaving a true copy at his usual place of abode with some member of his family over sixteen years of age. A married woman having a husband and children, of her own living in the house of her unmarried sister who is absent as a domestic servant in California, was not a "member" of such unmarried sister's family. *Hendricks v. Kellogg, et al.*, 22.

2. *Service of absent defendant at usual place of abode. Statute.*

Under Code 1906, section 3926, providing that summons shall be served, if defendant cannot be found, or no member of his family, aged sixteen, can be found at his usual place of abode who is willing to receive such copy, then by posting a true copy on a door of defendant's usual place of abode, where an unmarried woman owning a house in this state left it in the oc-

---

PROPERTY—PRINCIPAL AND SURETY.

---

## PROCESS—Continued.

cupancy of her married sister's family and went to California as a domestic servant, remaining there for two years, and intending to remain for an indefinite time, her residence in California was her "usual place of abode" while she was away. *Ib.*

## PROPERTY.

*See* BENEFICIAL ASSOCIATIONS.

## PRINCIPAL AND AGENT.

1. *Telegraphs and telephones. Negligence. Parties who may recover. Undisclosed principal.*

An undisclosed principal cannot recover damages for the negligent failure of a telegraph company to promptly deliver a message to his agent. *W. U. Telegraph Co. v. Lowden*, 379.

2. *Insurance. Agents. Authority.*

An agent who has authority to issue policies of fire insurance stands in the stead of the company, and his acts and declarations with reference thereto are the acts and declarations of the company, and the company is bound thereby. *L. & L. G. Ins. Co. v. Hinton*, 754.

3. *Insurance. Renewals. Contracts. Execution.*

A contract for the renewal of a fire policy becomes complete when an authorized agent of the insurer agrees to such renewal. *Ib.*

## PRINCIPAL AND SURETY.

1. *Subrogation.*

Where a county depository, after delivering bonds to a purchaser without full payment of the purchase price became insolvent, and its surety as such depository paid the county the balance due, in such case the surety was entitled to be subrogated as against the purchaser of the bonds, to the extent of the amount still unpaid to the depository for the purchase price of the bonds. *U. S. Fidelity Co. v. First State Bank*, 238.

2. *Insurance. Mortgage clause. Oral contract to substitute.*

An oral contract of renewal of insurance by an agent who has authority to write policies is valid and binding and an oral contract to substitute a mortgage clause in a policy is also good, since the mortgage clause is no more sacred nor formal an instrument than the insurance policy itself. *Hartford Ins. Co. v. Lumber Co.*, 822.

*See* MUNICIPAL CORPORATIONS.



---

PUBLICATION—QUIETING TITLE.

---

## PUBLICATION.

*See* NOTICE.

## PUBLIC LANDS.

*Refunds. Defective title. Limitation of actions. Accrual. Code 1906, section 2947.*

Under Code 1906, section 2947, providing for a refund of the purchase money where the state has no title to lands sold by it, the right of the patentee to such refund does not accrue, so that the statute of limitations begins to run against him, until the land commissioner cancels the patent and presents the original or a certified copy of the patent marked "canceled" to the auditor, the patentee having the right to depend on the patent until it is canceled. In such case it is not a question of warranty by the state upon which a right of action would accrue immediately to the vendee upon a breach to recover the purchase money. But simply a statutory right to a refund of the purchase money, and in pursuing his remedy the patentee must follow the methods laid down by the very statute which defines his rights. *Wilson v. Naylor*, 573.

## QUIETING TITLE.

1. *Complaint. Sufficiency.*

In all suits to confirm title or to remove clouds it is the duty of the complainant to deraign title and in deraigning title, a general statement that the complainant is the real owner is insufficient. *Russel et al. v. Town of Hickory*, 46.

2. *Complainant. Sufficiency. Code 1892, Section 4011.*

Where the town of Hickory, a municipal corporation, filed a bill alleging that it was the owner of certain school property that defendants had taken possession of such property and that complainant was entitled to an injunction restraining defendants from trespassing thereon, and praying a decree removing any cloud from its title. The bill alleged that the land had been conveyed to the trustees of the Hickory Institute, and their successors in office in 1889 for the benefit of the citizens of Hickory and the surrounding community and while it did not so specifically aver, it appeared that defendants claimed title from the same source under a clause providing for forfeiture when the property should be abandoned for educational purposes. The conveyance was made before the enactment of Code of 1892, section 4011, authorizing a municipality to become a separate school district and before the enactment of section 3343, Code 1906, authorizing municipalities "to erect, purchase, or rent school

---

 QUO WARRANTO—RAILROADS.
 

---

## QUIETING TITLE—Continued.

houses" and the bill did not aver that the property had been deeded to the municipality for school purposes. In such case the bill was insufficient to show that the municipality had title to the property. *Ib.*

## QUO WARRANTO.

*Trying title. Remedy. De facto officers.*

Where defendants were appointed by the Governor to the offices of alderman and members of the board of school trustees and were discharging the duties of such office, this constituted them *de facto* officers, and the only remedy of plaintiffs claiming title to the office was by *quo warranto*. *Town of Sumner v. Henderson*, 64.

*See* OFFICERS.

## RAILROADS.

1. *Right of way. Malicious destruction of property. Liability.*

Where a violent storm, dragged plaintiff's schooners from his canning factory and left them upon defendant's railroad track and the wrecking crew of the railroad company, wilfully and wantonly destroyed them at a time when there was no through traffic and the regular trains of defendant did not have occasion to pass until many days after the boat had been destroyed and there was time for the railroad company to have employed the service of those who knew how to jack up and remove the boats from the right of way or to permit plaintiff to do this work himself which could have been done in six hours. In such case defendant was liable in damages for the reckless destruction of plaintiff's property. *Louisville & N. R. R. Co. v. Joulhan*, 40.

2. *Fire from locomotives. Laws 1912, chapter 151.*

Since the enactment of chapter 151, Laws 1912, a railroad company is "responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated, directly or indirectly, by locomotive engines in use upon the railroad," and has "an insurable interest in the property upon the route of the railroad." This statute imposes liability regardless of negligence. *Tolsom v. Ill. Cent. R. R. Co.*, 561.

3. *Same.*

Under the facts as set out in its opinion in this case the court held that the evidence was sufficient to show that the fire was caused by sparks from defendant's locomotive. *Ib.*

---

RAILROAD COMMISSION—RECEIVERS.

---

## RAILROADS—Continued.

4. *Same.*

In such case the jury would have been warranted in finding that plaintiff was injured because of the negligence of a fellow servant while engaged in loading a car for transportation over defendant's railroad so that the case would fall within chapter 194, Laws 1908 (Hemmingway's Code, section 6684), giving railroad employees the same rights and remedies for injuries caused by an act or omission of the railroad company as are allowed by law to other persons not so employed. *Lockman v. Alabama & V. Ins. Co.*, 772.

5. *Same.*

In such case where there was no evidence that an engine was attached to the car at the time it was being loaded or that it was to be moved by steam, gas, gasoline, or lever power, the presumption arises that it was to be moved by the railroad company's usual motive power. *Ib.*

## RAILROAD COMMISSION.

*See* CARRIERS.

## RECEIVERS.

1. *Chattle mortgage. Security to landlord.*

Where a landlord takes a trust deed from his tenant to cover advances with which to make a crop, but immediately refuses to make the advances, such trust deed cannot be used as a basis for the appointment of a receiver, although it recites that it is to be also supplemental security for a balance due under a deed of trust for the preceding year, where the tenant acquiesces in the refusal of the landlord to furnish the advances and offers possession of the premises; since such acts are in effect a cancellation by agreement. *Burton v. Pepper*, 139.

2. *Chattel mortgage. Insolvency. Grounds for appointment of receiver.*

A landlord cannot take a deed of trust from his tenant to secure advances, and then refuse to make the advances and have a receiver appointed, although the tenant be of limited means and practically insolvent, unless he had the fraudulent intent of misappropriating the funds or was abandoning the property. *Ib.*

3. *Grounds for. Landlord and tenant. Chattel mortgages.*

A trust deed on stock, machinery, and crops given by a tenant to his landlord for a past year, is not basis for the appointment of a receiver to farm the rented premises and use the debtor's property for the current year. The only thing the landlord

---

RECEIVERS.

---

## RECEIVERS—Continued.

can do is to sell the property covered by the trust deed either in equity or by the trustee, and the tenant is entitled, where the tenancy is treated as terminated, to an early sale. *Ib.*

4. *Chattel mortgages. Action for possession. Summary action.*

A landlord cannot gain possession of the rented premises, from the tenant, by the summary appointment of a receiver without notice. *Ib.*

5. *Chattel mortgages. Unlawful use of property by landlord. Right to rent.*

Where a landlord having taken a deed of trust on the machinery and stock of his tenant for supplies to be furnished, had a receiver appointed before planting the crop, and without any order therefor spent money and used the tenant's stock and machinery, taking full control of the property though doing so in the name of the receiver, pending a delayed foreclosure of the trust deed. In such case the lease will be held to have been terminated and the tenant was not chargeable with rent after the receiver was appointed. *Ib.*

6. *Landlord and tenant. Grounds for appointment. Deed of trust. Foreclosures.*

To justify a receiver in a foreclosure suit there should be a clear showing of inadequacy of the security, the insolvency of the mortgagor, and a present need for the preservation and management of the mortgaged property; also that the tenant had either, removed or abandoned the premises or was misappropriating the property and placing it beyond the jurisdiction of the court, or doing some other act tending to destroy the value of the security. *Ib.*

7. *Appointment. Notice. Necessary. Good cause. Code 1906, section 625.*

Under Code 1906, section 625, providing that "good cause" must be shown why notice should not be given only the greatest emergency will entitle one to the appointment of a receiver without notice. Mere insolvency does not justify the appointment of a receiver to take charge of the assets of an individual debtor. *Ib.*

8. *Application for appointment. After litigation conditions.*

Conditions in property after the institution of proceeding for the appointment of a receiver in a foreclosure suit, cannot change the legal rights of the parties as they existed at the time of the institution of the suit. *Ib.*

---

RECORDS—SALES.

---

## RECEIVERS—Continued.

9. *Motion for removal. Intervening parties' rights.*

The joining in of creditors, after the appointment of a receiver, seeking merely their *pro rata* share in any excess after the secured creditors are paid, has no direct bearing on the rights of the original parties, in a proceeding to remove the receiver for error in his appointment. *Burton v. Pepper*, 139.

## RECORDS.

*Mortgages. Deeds of trust. Assignment of debt. Recording. Code 1906, section 2794.*

Under section 2794, Code 1906, providing for notation on the margin of the record of assignments of debts secured by mortgages or trust deeds, it is not required that assignments of recorded instruments shall be recorded on any particular page or pages of the record books, and where the original trust deed or the assignment of the same, the refusal of the original trustee to act, and the appointment of another trustee, all appear on the margin of the same page of the record, it was a sufficient compliance with the statute. *West v. Union Naval Stores Co.*, 743.

## RELEASE.

*Adequacy. Evidence.*

Under the evidence in this case the court held that the finding of the jury that the payment of five hundred dollars by the master to the widow of a deceased employee was not in full settlement of her claim for damages, was warranted, such a payment being inadequate for that purpose. *Huff v. Bear Creek Mill Co.*, 509.

## RES ADJUDICATA.

*See JUDGMENT.*

## RESIDENCE.

*See PROCESS; LIMITATION OF ACTIONS.*

## RES IPSA LOQUITUR.

*See NEGLIGENCE.*

## SALES.

1. *Sales on trial. Failure to return. Acceptance.*

Under a contract for sale of a piano on trial, which provided that the buyer accepted the seller's offer to try one of its pianos, that without obligation on his part to purchase, the seller might ship the piano ordered below; that after testing the instrument

---

SALES.

---

## SALES—Continued.

for thirty days, if the buyer decided to keep it, he would pay for it as stated below, and would sign the selling contract and that if he decided not to keep it, he would return it to the freight depot subject to the seller's order, the buyer was under duty either to accept the piano or return it to the depot of a common carrier at the end of the 30 days' trial, and where the buyer made no effort whatever to return the piano, and did not respond to the seller's numerous letters for several months, he must be treated in law as having accepted the piano and was liable for the price. *Evans Piano Co. v. Tully*, 267.

2. *Cancellation. Validity.*

Where the seller received the purchaser's telegram of confirmation of sale within the time stipulated, before the purchaser received the seller's telegram of cancellation, such attempted cancellation was void. *Telegraph Co. v. Hazlehurst O. M. & F. Co.*, 372.

3. *Delivery. Question for jury.*

Whether under the facts of this case a sale of cotton on the seller's gin platform was with the understanding that the delivery was then complete, so that the cotton was thereafter at the buyer's risk, was a question for the jury. *Townes & Sturdivant, v. Holland & Co.*, 541.

4. *Same.*

A custom to draw with the bill of lading attached does not necessarily carry with it the idea that a sale is not complete until this formality is complied with. *Ib.*

5. *Same.*

Under the facts in this case the fundamental question was as to the intention of the parties, and such intention was to be gathered from the course of dealing between the parties of the contract, the acts performed and the language uttered at the time the transaction was had. *Ib.*

6. *Corporations. Fraud of organizer. Secret profits. Reservation of title.*

Where an organizer of a bank contracted for the bank for a safe, with a provision in the contract that title to the safe was to remain in the seller until fully paid for, the fact that there was a fraudulent agreement between the seller and the organizer, that a fictitious price should be placed on the safe, the organizer to get the difference between the real and fictitious price, did not make the sale one to the organizer, so as to constitute a waiver of the clause of the contract as to the retention of the title, nor prevent the seller from recovering the safe from the

---

SCHOOLS—SET-OFF AND COUNTERCLAIM.

---

## SALES—Continued.

bank where no payments thereon had been made. *Hall v. Safety Co.*, 606.

7. *Actions. Liability.*

In a suit for the price of feedstuff, the mere fact that a letter from the defendant to plaintiff acknowledged the indebtedness sued for and promised to pay same, was not conclusive against the defendant, under the facts herein, for the reason that if there was no liability on the part of defendants before the letter was written, there could be none afterwards, because of no consideration. *Brooks & Myers v. Gulfport Grocery Co.*, 646.

## SCHOOLS AND SCHOOL DISTRICTS.

1. *Consolidated districts. Elections. Bonds. Withdrawing names. Rights of signers.*

Signers to a petition addressed to a board of supervisors or a municipality can take their names therefrom by signing a counter-petition. *Price v. Sims*, 687.

2. *Consolidation. Bond issues.*

Under chapter 197, Acts 1914, sections one and two amending Acts 1912, chapter 159 (Hemmingway's Code, section 7357), making it the duty of the board of supervisors to issue bonds for building and repairing schools in consolidated school districts on petition of a majority of the tax-payers, and providing that such bonds shall be issued as provided in the chapter on municipalities, refers only to section 3416, Code 1906 (Hemmingway's Code, section 5975), which provides a complete scheme for the issuance of bonds, and not to section 3419; Code 1906 (Hemmingway's Code, section 5978), which requires, before the issuance of municipal bonds, that the board shall publish notice of the proposal, so that, when a petition under chapter 197, Acts 1914 (Hemmingway's Code, section 7357), contains a sufficient number of names, it is mandatory upon the board to issue the bonds, and no election need be called or notice given. *Id.*

## SET-OFF AND COUNTERCLAIM.

1. *Equitable set-off. Accounting.*

In a suit for an accounting, where the bill asked the chancery court to take jurisdiction of all equities and matters of accounting between the parties, and the chancellor found that the amount due defendant on a note, secured by a trust deed on oxen, for which defendant had instituted a suit in replevin, was a specific amount, he should have allowed any amount due plaintiff to be set-off against the amount due the defendant, so that either

---

 SPECIFIC PERFORMANCE—STATUTES.
 

---

## SET-OFF AND COUNTERCLAIM—Continued.

party could then plead in the circuit court where the replevin suit was pending, the decree of the chancery court relating to the matter. *Hebron Bank v. Gambrell*, 343.

2. *Grounds. Mutual indebtedness.*

Where plaintiff's declaration alleged that defendant was indebted to him on cotton purchases made for plaintiff, defendant could plead as a set-off that a true accounting of such transactions showed a balance due him, since the account of each of the plaintiffs and defendant recognized mutual dealings and mutual indebtedness. *Weil Bros. v. Wittjen*, 514.

3. *Grounds. Liquidated demands.*

Where plaintiff's declaration alleged that defendant was indebted to him on cotton purchases and defendant pleaded that a true accounting showed a balance due him, such a counterclaim is not an unliquidated demand, but is founded on contract, capable of calculation, and may be pleaded as a set-off. *Id.*

## SPECIFIC PERFORMANCE.

*Contract requiring superintendence of court.*

Equity will not direct a specific performance of a contract where it would require constant superintendence of the court from day to day for an indefinite time in order to enforce the carrying out of its decrees. *Jones v. Mississippi Farms Co.*, 295.

*See INSURANCE.*

## STATUTES CITED AND CONSTRUED.

- Ch. 80. (1902). Constitutional Law. Validity of act. Burden of proof. *Tel. & Cable Co. v. Robertson*, 204.
- Ch. 80. (1902). Levees. Tax by commissioner. Notice. *Tel. & Cable Co. v. Robertson*, 204.
- Ch. 94. (1912). Commerce. Interstate commerce. Employment agencies. Licenses. *Garbutt v. State*, 424.
- Ch. 124. (1914). Banks and banking. Stockholders. Double liability. Time to sue. Increasing liabilities of stockholders. Constitutionality. Statute. Application. *Pate v. Bank of Newton*, 666.
- Ch. 151. (1912). Railroads. Fire from locomotives. *Tolsom v. Ill-Cent. R. R. Co.*, 561.
- Ch. 162 (1914). Pleading. Withdrawal of plea. Abandonment of defense. *Casualty Co. v. Oil & Fertilizer Co.*, 285.
- Ch. 162 (1914). Corporations. Foreign corporations. Power of state. *State ex rel. Collins v. Cotton Oil Co.*, 398.



---

 SUBROGATION—TAXATION.
 

---

## STATUTES CITED AND CONSTRUED—Continued.

- Ch. 194 (1908). Master and servant. Question for jury. Application of fellow servants' doctrine. *Lockman v. Alabama & V. Ry. Co.*, 772.
- Ch. 195 (1914). Ch. 269. Drains. Formation of drainage districts. Notice to landowner. Statute. *Wooten v. Hickahala Drainage District*, 787.
- Ch. 197 (1914). Schools and school districts. Consolidation. Bond issues. *Price v. Sims*, 687.
- Ch. 206 (1916). Insurance. Mutual benefit insurance. Defenses. Misstatements in application. *W. O. W. v. Farmer*, 626.
- Ch. 214 (1914). Death by wrongful act. Negligence. Statutes. *Kirkpatrick v. Ferguson-Palmer Co.*, 874.
- Ch. 215 (1912). Carriers. Passengers. Statutory presumptions. "Running." *G. & M. Coast Traction Co. v. Hicks*, 164.
- Ch. 496 (1866-67). Wills. Marriage. Revocation. *Lee v. Blewett*, 341.

## SUBROGATION.

*Principal and surety.*

Where a county depository, after delivering bonds to a purchaser without full payment of the purchase price became insolvent, and its surety as such depository paid the county the balance due, in such case the surety was entitled to be subrogated as against the purchaser of the bonds, to the extent of the amount still unpaid to the depository for the purchase price of the bonds. *U. S. Fidelity Co. v. First State Bank*, 239.

## TAXATION.

1. *Constitutional law. Validity of act. Burden of proof.*

The provisions of section 112 of the Constitution do not require the taxing body to levy privilege taxes according to the requirements of that section. *Tel. & Cable Co. v. Robertson*, 205.

2. *Uniformity. Privilege tax.*

The Constitution does not require that a municipal corporation, or taxing district, authorized by law to levy and collect privilege taxes require all privileges to be taxed that are authorized; nor that they shall be taxed in the same proportion to the maximum named in the statute, but so long as all persons exercising any particular privileges are taxed alike, under the same circumstances no constitutional principle is violated. *Id.*

3. *Levees. Tax by commissioner. Notice.*

Under the Act of 1902, chapter 80, authorizing the levee commissioner to impose a privilege tax in said district by an order entered upon its minutes, it was not required that the order levy-

---

TAXATION.

---

## TAXATION—Continued.

ing privilege taxes should be published in a newspaper or otherwise, except that a copy of the order should be sent to the sheriffs of the several counties of the levee district. It did not require the levee board to give notice to persons or corporations desiring to exercise privileges in the district, nor was it necessary for the board to give such notice in order to make the ordinance valid, all persons being charged with notice under the statute, of the power of the board to levy privilege taxes upon occupations, privileges and businesses. *Ib.*

4. *Taxation by state. National banks.*

While it is true that a national bank is not subject to taxation upon its capital stock by the state or any subdivision thereof yet the shares into which its capital stock is divided, and which are the property not of the bank but of the holders thereof may be taxed, under the provisions of U. S. Revised Statutes, section 5219 (U. S. Comp. St. 1916, section 9784), and the taxes imposed thereon may be collected in the first instance from the bank itself "as the debt and in behalf of the shareholders, leaving to the corporation the right to reimbursement for the tax paid, from the shareholder." *Adams v. First Nat. Bank of Gulfport*, 450.

5. *Same.*

And such is the object sought to be accomplished by Code 1906, section 4273, Hemingway's Code, section 6907, under which the tax is imposed. *Ib.*

6. *Same.*

That this statute makes no provision for a recovery by the bank from its shareholders, for the taxes paid by it pursuant thereto, is not material, for the reason that such recovery may be had "under the general principle of law that one who pays the debt of another, at his request can recover the amount from him." *Ib.*

7. *Tax sale. Validity.*

Whenever there is a legal bidder at a tax sale the collector must make title to him, and in that case any sale to the state is void, the bidder would have a right to the deed and the collector could not deny or limit that right by a conveyance to the state. *Thibodeaux v. Havens*, 476.

8. *Tax sales. Presumptions.*

The statutory presumption that a tax deed to an individual conveyed a perfect title, except for certain defenses, is not overcome by the fact that the land was also sold to the state at the same

---

TAX DEEDS—TELEGRAPHS & TELEPHONES.

---

## TAXATION—Continued.

time, since the deed to the individual purchaser conclusively established that there was a bidder, that the money was paid to the collector and the deed executed and it necessarily follows that the deed to the state in such case was a nullity. *Thibodeaux v. Havens*, 476.

9. *Tax deed. Presumptions.*

Where a tax deed recites a legal sale in the absence of proof to the contrary, it will be presumed that the deed recites the facts. *Ib.*

10. *Evidence. Tax deed. Correction of description by extrinsic evidence.*

Where the tax assessment described land sold for delinquent taxes as "Mrs. N. M. Fairley, fifty feet on east half of lots 7 to 12, block 100, section 4, township 8, range 11, City of Gulfport," and the tax deed described the land as "One lot fifty feet on east half of lots 7 to 12," etc., lots 7 to 12 being one hundred and sixty feet long, running east and west. Therefore the description "East half of lot 7 to 12" would certainly designate the east eighty feet of these lots. The tax deed calls for fifty feet on this eighty foot tract. Whether this fifty feet be intended on the east or west end of this eighty-foot tract, the tax deed on its face does not disclose, but the assessment and tax deed furnish the clue which, when followed by the aid of other testimony, conducts certainly to the land intended, and in such case oral testimony and documentary proof may be introduced for this purpose. *Albritton v. Fairley*, 705.

*See* JUDGMENT; LEVEES.

## TAX DEEDS.

*See* TAXATION.

## TAX SALES.

*See* TAXATION.

## TELEGRAPHS AND TELEPHONES.

1. *Receipt of message. Notice by telegraph company.*

The fact that a telegram confirming a sale to the sender of certain cotton was received by the seller within the time agreed upon, and the purchaser believed that cancellation by the seller was received by him before confirmation of sale was received by the seller, did not render the telegraph company liable for not having notified him of the delivery of the telegram; such notice not being necessary, except in case of a repeated message. *Telegraph Co. v. Hazlehurst, O. M. & F. Co.*, 372.

---

TORTS—TRIAL.

---

## TELEGRAPHS AND TELEPHONES—Continued.

2. *Negligence. Parties who may recover. Undisclosed principal.*

An undisclosed principal cannot recover damages for the negligent failure of a telegraph company to promptly deliver a message to his agent. *W. U. Telegraph Co. v. Lowden*, 379.

3. *Stipulations as to liability. Effect.*

A telegraph company cannot contract against its own negligence and a stipulation on the back of a telegram undertaking to exempt the telegraph company from liability for its negligence in transmitting a message, though an unrepeatable one, is invalid and the company is responsible for losses occasioned by its negligence in transmission. *Lumber Co. v. Telegraph-Cable Co.*, 660.

## TORTS.

*Joint and several liability.*

It is settled in this state that tort-feasors may be sued jointly and severally, and that one joint tort-feasor is not released from liability by suit or judgment against the others, but that it requires a satisfaction or payment to satisfy the liability against joint tort-feasors. *Sawmill Const. Co. v. Bright*, 491.

## TRESPASS.

1. *Public lands. Lease. Timber cutting by trespasser. Compromise. Sixteenth section.*

The owner of the lease to a sixteenth section has such an interest in the timber growing on the land as will entitle him to recover damages for the wrongful removal of the timber by a third person, even though after the timber was cut from the land there remained on the land a plenty of timber for estovers. *Lewis v. Myer*, 454.

2. *Same.*

In such case the owner of the lease may recover on a note given him in compromise by one who has wrongfully cut timber thereupon. *Ib.*

## TRIAL.

1. *Pleading. Withdrawal of plea. Abandonment of defense.*

Where in an action by a fertilizer company against a casualty company on its policy to indemnify for loss sustained by larceny or embezzlement of employees, the casualty company filed a plea setting up that it was unlawful for the fertilizer company to operate a gin after the passage of chapter 162, Laws 1914, but withdrew the plea though it moved to strike out the evidence and grant it a peremptory instruction, basing the statute as a ground therefor. In such case the court had a right to treat the defense as having been abandoned with the withdrawal of the plea. *Casualty Co. v. Oil & Fertilizer Co.*, 283.

---

TRIAL.

---

## TRIAL—Continued.

2. *Insurance. Actions. Question for jury. Peremptory instructions.*

In an action by an employer against a casualty company on its policy to indemnify such employer for all loss of money, etc., constituting larceny or embezzlement by an employee, it was improper for the court to grant a peremptory instruction for the employer, where the employee gave testimony which if true showed that the shortage in his accounts did not come about by any act of larceny or embezzlement on his part. *Casualty Co. v. Oil & Fertilizer Co.*, 283.

3. *Same.*

In such case it was improper for the court to exclude testimony offered by the employer showing that he had not embezzled or stolen any of his employer's money or property. *Ib.*

4. *Master and servant. Relation. Question for jury.*

Whether or not plaintiff who was employed and paid by one party, but was injured while cranking an engine at the request of a foreman of another party was at the time of the accident the servant of the other party was a question for the jury. *Sawmill Const. Co. v. Bright*, 492.

5. *Instructions. Matters admitted.*

Where in a suit by a servant against the master for damages caused by falling through a trap door, the master admitted the dangerous condition of the door and based its defense upon the theory that the servant was cautioned not to get upon it. In such case an instruction for plaintiff that the door through which plaintiff fell was inherently dangerous did not constitute error. *Newton Oil Mill v. Spencer*, 568.

6. *Appeal and error. Harmless error. Instructions. Contributory negligence.*

In such case an instruction that the master must prove by a preponderance of the evidence that the servant had notice of the dangerous condition of the trap door through which he fell, was not prejudicial to the master's rights, since such instruction merely told the jury that the burden was upon the defendant as to contributory negligence. *Ib.*

7. *Executors and administrators. Disputed claims. Review. Questions of fact.*

Where on the trial of a contest by the administrator of a claim against the estate of his decedent, the books of the claimant were introduced and their correctness duly attested by the book-keeper, who in addition testified positively as to paying out all the items of cash charged on the account against the decedent either to the decedent himself or at his request, to his employees, in such case the credibility and weight of this testimony was a matter for the determination of the auditor and the chancellor,

---

 USURY.
 

---

## TRIAL—Continued.

who gave full hearing to the auditor's report. *Barner v. Rule*, 600.

8. *Sales. Question for jury.*

Where there is a conflict in the testimony offered by the plaintiff and defendant on the issue of *nil debit*, the issue should be submitted to the jury. *Brooks & Myers v. Grocery Co.*, 646.

9. *Wills. Contest. Instructions. Burden of proof.*

Where a will which had been duly filed for probate and was admitted to probate by the chancery clerk in vacation was being contested on the ground that the testator had made a subsequent will revoking the first, an instruction for the contestants, "that if the whole evidence in the case leaves it doubtful whether the will probated and now being contested was the true last will of deceased, the jury should find against its validity; for it is incumbent upon the proponents of the said will by a preponderance of the evidence to reasonably satisfy the minds of the jury that the instrument was in truth the last will of deceased," was erroneous because the burden of proof was not upon the proponents to disprove the validity of the subsequent will, but it was upon the contestants to show affirmatively that the alleged subsequent will sought to be proven orally by contestants, was legally and validly executed in all respects as required by law; and unless this burden was met by contestants, the former valid, probated will was not revoked, but should prevail as the last will and testament of deceased. *Williams v. Moorehead*, 653.

10. *Wills. Questions for jury.*

Under the facts as set out in its opinion in this case involving the validity of a will, the court held that the issues of execution, sanity of testatrix, and undue influence, should have been submitted to the jury. *Helm v. Sheets*, 726.

11. *Master and servant. Question for jury. Application of fellow servants' doctrine. Laws 1908, chapter 194. Hemmingway's Code, section 6684.*

Where an employee of a railroad company while employed in loading rails upon a flat car was injured because some of his fellow servants gave an unusual or sudden jerk to the rail which they were lifting to place upon the car which caused it to fall and injure his leg and there was no evidence as to why such sudden and unusual jerk was given, in such case a peremptory instruction for the defendant was erroneous. *Lockman v. Alabama & V. Ry. Co.*, 772.

See PARTITION.

## USURY.

1. *Actions. Evidence. Accounting.*

Where in a suit by a customer of a bank for an accounting he

116 Miss.—63

---

WAIVER—WILLS.

---

## USURY—Continued.

filed slips showing that the bank had charged him one hundred and seventeen dollars and forty-seven cents usurious interest on invoices and overdraft accounts and testified generally that he had examined the books of the bank, and it was his best judgment that the overcharge or the usurious interest charged on both these accounts amounted to two hundred and forty dollars and thirty-two cents, such evidence did not justify a decree in his favor for both the one hundred and seventeen dollars and forty-seven cents and the two hundred and forty dollars and thirty-two cents as the first item was included in the second and besides the testimony as to the two hundred and forty dollars and thirty-two cents is very indefinite and should have been more certain and specific. *Hebron Bank v. Gambrell*, 343.

2. *Recovery of usurious interest. Ignorance or mistake.*

Where a bank is sued for usurious interest charged by it, the fact that the officials of the bank were ignorant of the law or temporarily overlooked it, is no defense. *Ib.*

3. *Recovery of usurious interest. Rights of assignee.*

Where usurious interest was paid to a bank by a partnership, it was recoverable by one of the partners to whom the partnership account with the bank, together with all charges of every character, except items specifically excluded, were transferred and assigned on a settlement and dissolution of the partnership, since in such case he stood in the place of the partnership. *Ib.*

## WAIVER.

See CARRIERS; INSURANCE.

## WILLS.

1. *Construction.*

A will reading "I give to J. P. R. (my adopted son) his natural life, my dwelling and all land I now possess except, etc., and upon his death to his children, if any, and if he should die without leaving any living children, or should die with children and they should die, thereupon or at their death, etc., to be equally divided between C. C. & S." gave an estate for life to J. P. R. with remainder in fee to his children, as provided by Code 1906, section 2764, and there being children, C. C. and S. would receive nothing, unless J. P. R. and his children should die before the testatrix; the rule being that, where the death of persons is dealt with as an uncertain event, it is presumed that not their death alone is meant, but at a particular time or under particular circumstances, and where it does not appear that such death was meant under particular circumstances, it will be presumed that the death should occur prior to the death

---

WILLS.

---

## WILLS—Continued.

of the devisee before the vesting in him of the property in possession, and to hold otherwise than that under this will the death should occur before the death of the testatrix would render the devise to C. C. and S. void for uncertainty. *Bilby v. Broome*, 70.

2. *Perpetuities. Devise for more than two lives. Code 1916, section 2269.*

Under Code 1906, section 2765, providing that a conveyance or devise can be made in succession to two lives in being, then to the heirs of the body of the remainderman or right heirs of the donor, in fee simple, where the third in succession is not such an heir, the grant or devise is void, since such statute governs all grants and devises to a succession of donees, in so far as the number thereof and the class to which the last donee must belong is concerned, and a grant or devise in violation of it is void. *Ib.*

3. *Perpetuities. Burden of proof. Code 1906, section 2765.*

Under Code 1906, section 2765, providing that a conveyance or devise can be made in succession to two lives in being then to the heirs of the remaindermen or right heirs of the donor; the rule is that, unless and until the contrary appears the third donee will be presumed to be within one of the classes referred to in the statute. In other words, the burden of proving that such a donee is neither an heir of the body of the remainderman nor a right heir of the donor, is upon him who seeks to avoid the grant or devise for that reason. *Ib.*

4. *Marriage. Revocation.*

The reason upon which the rule of the common law that a will made by a *feme sole* was revoked by her subsequent marriage was based, was that marriage destroyed the ambulatory nature of the will and left it no longer subject to the wife's control, but since our statutes removing the disabilities of coverture, beginning with chapter 496, page 725, Laws 1866-67, having conferred full testamentary capacity upon married women, the reason of the rule has ceased, and consequently so has the rule itself. *Lee v. Blewett*, 341.

5. *Contest. Instructions. Burden of proof.*

Where a will which had been duly filed for probate and was admitted to probate by the chancery clerk in vacation was being contested on the ground that the testator had made a subsequent will revoking the first, an instruction for the contestants, "that if the whole evidence in the case leaves it doubtful whether



---

WILLS.

---

## WILLS—Continued.

the will probated and now being contested was the true last will of deceased, the jury should find against its validity; for it is incumbent upon the proponents of the said will by a preponderance of the evidence to reasonably satisfy the minds of the jury that the instrument was in truth the last will of deceased;" was erroneous because the burden of proof was not upon the proponents to disprove the validity of the subsequent will, but it was upon the contestants to show affirmatively that the alleged subsequent will sought to be proven orally by contestants, was legally and validly executed in all respects as required by law; and unless this burden was met by contestants, the former valid, probated will was not revoked, but should prevail as the last will and testament of deceased. *Williams v. Moorehead*, 653.

6. *Execution. How proved. Code 1906, section 1991.*

Under Code 1906, section 1991 (Hemmingway's Code, section 1656), providing that the due execution of a will must be proved by at least one of the subscribing witnesses when present in person, where such attesting witness cannot be procured, or refuses to testify or denies the execution of the will, such execution may be established by other proof. *Ib.*

7. *Execution. Secondary evidence. Probate.*

When a will is presented for probate, secondary evidence cannot be used to establish its due execution, if any of the subscribing witnesses will and can prove the facts until they have been called or produced. *Helm v. Sheeks*, 726.

8. *Execution. Secondary evidence.*

Where a subscribing witness to a will was not within the state and an effort was made to take his deposition which was unavailing and counsel for the proponent of the will was led to believe that the witness would be at the trial, and that he would be a hostile witness. In such case it was competent to produce other witnesses bearing on the execution of the will, the sanity of the testatrix, and the question of undue influence. *Ib.*

9. *Witnesses. Contest. Testimony of interested party.*

The testimony of a party cannot be received to establish or to destroy a will where the party testifying would become the recipient of the property of the decedent or some portion thereof. *Ib.*

10. *Trial. Questions for jury.*

Under the facts as set out in its opinion in this case involving the validity of a will, the court held that the issues of execution,

---

WITNESSES—WORDS AND PHRASES.

---

## WILLS—Continued.

sanity of testatrix, and undue influence, should have been submitted to the jury. *Ib.*

## WITNESSES.

1. *Privileged communications. Physicians.*

The testimony of a physician who attended plaintiff after his injury was properly excluded on plaintiff's objection. *Newton Oil Mill v. Spencer*, 568.

2. *Privileged communications. Waiver by contract.*

The privilege created by section 3695, Code 1906 (Hemmingway's Code, section 6380), in reference to communications to physicians, is personal to the physician's patient and may be waived by him either before or at the trial, and where one of the considerations upon which a policy was issued was the waiver by the insured of such privilege, in such case his physician was a competent witness, although he obtained his knowledge of his condition while treating him professionally. *W. O. W. v. Farmer*, 626.

3. *Wills. Execution. Secondary evidence.*

Where a subscribing witness to a will was not within the state and an effort was made to take his deposition which was unavailing and counsel for the proponent of the will was led to believe that the witness would be at the trial, and that he would be a hostile witness. In such case it was competent to produce other witnesses bearing on the execution of the will, the sanity of the testatrix, and the question of undue influence. *Helm x. Sheek*, 726.

4. *Will. Contest. Testimony of interested party.*

The testimony of a party cannot be received to establish or to destroy a will where the party testifying would become the recipient of the property of the decedent or some portion thereof. *Ib.*

*See EVIDENCE.*

## WORDS AND PHRASES.

1. *Leg.*

The common definition of "leg" does not include the foot nor any of the bones of the foot. *Butler v. E. H. of Columbian Woodmen*, 85.

2. *Insurance. Accident insurance. Construction. Severance of hand.*

Under an accident insurance policy providing a specific indemnity

---

WORDS AND PHRASES.

---

## WORDS AND PHRASES—Continued.

if insured should sustain the loss of a hand by severance at or above the wrist, where there was an injury to one of insured's hands whereby he lost the use of it to a great extent, such an injury was not covered by the terms of his policy, as "severance" means the removing any thing, etc., the act of severing or dividing, or separating, the state of being severed or separated, or the state of being disjoined or separated. *Metropolitan Casualty Ins. Co. v. Shelby*, 278.

S. J. D.  
6/15/18

















